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9609

No. 12396

United States
Court of Appeals
For the Ninth Circuit.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, CONTRACTORS, PACIFIC NAVAL AIR BASES, PACIFIC BRIDGE COMPANY, UNITED STATES FIDELITY & GUARANTY CO., a Corporation, and BUILDERS, PEARL HARBOR DRY DOCK No. 4,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED
FEB 2 - 1950
PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12396

United States Court of Appeals

For the Ninth Circuit.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, CONTRACTORS, PACIFIC NAVAL AIR BASES, PACIFIC BRIDGE COMPANY, UNITED STATES FIDELITY & GUARANTY CO., a Corporation, and BUILDERS, PEARL HARBOR DRY DOCK No. 4,

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NAMES AND ADDRESSES OF ATTORNEYS

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

Attorney for Defendant and Appellant.

TIPTON & WEINGAND,

1220 Broadway Arcade Building,
Los Angeles, California.

Attorneys for Plaintiffs and Defendants.

Trial before the
Honorable Louis E. Goodman, District Judge,
sitting without a jury.

In the District Court of the United States, Northern District of California, Southern Division.

No. 28507G

LIBERTY MUTUAL INSURANCE COMPANY, a corporation; Contractors, PACIFIC NAVAL AIR BASES; PACIFIC BRIDGE COMPANY; UNITED STATES FIDELITY & GUARANTY CO., a corporation; and Builders, PEARL HARBOR DRY DOCK NO. 4,

Plaintiffs,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency; and FRED F. LAIRD,

Defendants.

COMPLAINT FOR INJUNCTION

Plaintiffs complain of defendants and for cause of action allege:

I.

Jurisdiction is founded on the existence of a question arising under Title 33, U.S. Code, Sec. 921, 44 Stat. 1436, as amended, 49 Stat. 1921; and under Naval Bases Act, Act of Congress, August 16, 1941, as amended by the Act of Congress of December 2, 1942.

II.

On or about December 2, 1941, defendant Laird was injured on Johnson Island while employed by plaintiff Contractors, Pacific Naval Air Bases, for whom plaintiff Liberty Mutual Insurance Company was the compensation carrier. Said injury was thereafter aggravated and the disability increased as the result of an injury to said defendant's back, on or about January 13, 1942, while said defendant was employed as a carpenter by plaintiff Builders, Pearl Harbor Dock No. 4, for whom plaintiff United States Fidelity & Guaranty Co. was the compensation carrier.

III.

Said defendant Laird filed separate claims for compensation against plaintiffs, which said claims were consolidated for hearing before Defendant Pillsbury. On November 4, 1942, defendant Pillsbury issued two separate compensation orders, finding that Laird sustained injury arising out of and in the course of his employment on December 2, 1941; that the injury of January 13, 1942, aggravated and increased the disabling condition; that the compensation and medical expense for disability after January 13, 1942, should be shared equally between plaintiff employers or their insurance carriers. An award was made against each employer for half the compensation. The compensation rate was $12.50 per week from each employer, which is

one-half the maximum prescribed by the Longshoremen's and Harbor Workers' Compensation Act.

IV.

Plaintiffs continuously paid said awards until $3750 had been paid under each award, or a total of $7500 paid. Thereupon, pursuant to 33 U.S.C.A. Sec. 914 (m) which provides that

"The total amount payable under this Act for injury or death shall in no event exceed the sum of $7500.00."

the plaintiffs, on or about October 29, 1948, filed with defendant Pillsbury their petitions to terminate liability under the aforesaid orders and awards of November 4, 1942.

V.

On or about December 1, 1948, defendant Pillsbury duly denied the plaintiffs' said petitions to terminate said liability. This complaint is filed within thirty days of said order, pursuant to 33 U.S. Code, Section 921(2).

VI.

Copies of defendant Pillsbury's said orders of December 1, 1948, are annexed hereto and marked Exhibits "A" and "B".

VII.

Plaintiffs contend that the said orders of said defendant are not in accord with the law and are beyond the jurisdiction of said defendant, in that the

$7500 maximum applies to all awards to a single claimant, under the Act, regardless of how many employers or injuries are involved, especially where the two injuries are closely connected in time and result in a single disability for which liability is apportioned.

Wherefore, Plaintiffs demand that:

1. Defendants be enjoined by appropriate process to show cause why a permanent injunction should not be granted to restrain defendants from enforcing said orders and awards;

2. The judgment of this Court establish that the plaintiffs have no further liability to defendant Laird, the maximum liability of $7500.00 having been already paid.

3. Such other relief as shall be proper, be awarded.

TIPTON & WEINGAND,
SYRIL S. TIPTON,
CLAUDE F. WEINGAND,

By /s/ CLAUDE F. WEINGAND,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 22, 1948.

[Title of District Court and Cause.]

MOTION OF DEPUTY COMMISSIONER TO DISMISS COMPLAINT

Now comes the defendant Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District of the Bureau of Employees' Compensation, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Complaint after review of the Compensation Order filed herein, for the following reasons:

1. That the Complaint filed herein does not state a cause of action and does not entitle plaintiffs to any relief, nor does said Complaint state a claim against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

2. That it appears from the Complaint, including the transcripts of testimony taken before the Deputy Commissioner on file herein, that the findings of fact the Deputy Commissioner in the Compensation Orders filed by him on November 4, 1942 and December 1, 1948, complained of in the Complaint, were supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That it appears from the Complaint, including said transcripts of testimony, that said Compen-

sation Orders complained of herein are in all respects in accordance with law.

4. For such other good and sufficient reasons as may be shown.

FRANK J. HENNESSY,
United States Attorney,

By /s/ DANIEL C. DEASY,
Assistant United States Attorney, Attorneys for Defendant Warren H. Pillsbury, Deputy Commissioner.

[Endorsed]: Filed April 22, 1949.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 9th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable LOUIS E. GOODMAN,
District Judge.

[Title of Cause.]

ORDERED JUDGMENT FOR PLAINTIFF

Ordered that judgment be entered for plaintiff as will more fully appear in a signed opinion and order this day filed.

[Title of District Court and Cause.]

OPINION AND ORDER

Goodman, District Judge.

This is a proceeding to set aside an order of the Deputy Commissioner refusing to terminate compensation awarded under the Longshoremen's and Harbor Workers' Compensation Act (33 USC §901 et seq.) as made applicable to persons employed at certain defense bases by the Naval Bases Act of August 16, 1941 (42 USC §§1651-1654).

Plaintiff employers and their respective insurance carriers had petitioned the Deputy Commissioner to terminate compensation payments on the ground that defendant Laird had been paid the $7,500 maximum compensation allowable under the Act. Section 14m of the Act (33 USC 914m) provides that "the total compensation payable under this Act for injury or death shall in no event exceed the sum of $7,500."[1] The Deputy Commissioner interpreted this section to mean that $7,500 is the maximum compensation for each separate injury. He found that Laird's disability was the result of

[1]In two Circuits it has been held that compensation for injury and compensation for death are independent awards, and that under Section 14m, there is a $7,500 limit on death benefits and another $7,500 limit on compensation for injury. See Norton v. Travelers Insurance Co. 105 F.2d 122 (3 Cir. 1939); International Mercantile Marine Co. v. Lowe, 93 F.2d 663 (2 Cir. 1938).

two injuries and ordered that payments continue.

Both sides seem to be in agreement that, in order to resolve this controversy, the Court must decide whether Section 14m states the maximum compensation an employee can receive for each separate injury or, as the plaintiffs urge, the maximum he may receive for all injuries in the course of his industrial life.[2] But the Court need not reach this question under the facts of this case. Whether the employee actually had more than one injury is the true issue upon which the cause can and should justly be determined.

On December 2, 1941, Laird was employed as a carpenter at Johnston Island, in the Pacific, by Pacific Naval Air Bases. While aiding other workmen in lifting a steel derrick, Laird felt a sudden sharp pain in his back. Though he immediately ceased lifting the derrick, the pain continued and he was unable to return to his work. For several days he was given heat treatments, and then, because the pain in his back prevented him from working, he was given leave to go to Honolulu in order to obtain a pair of eye glasses he had needed for some time. Laird arrived in Honolulu on December 10, and on December 13, he reported for transportation back to Johnston Island. He was then informed he was to be loaned to Pearl Harbor Dry

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[2]Section 14 m was completely revised by the Act of June 24, 1948 (62 Stat. 603) and the issue here tendered could not now arise. This case, however, is governed by Section 14m as it read in 1942.

Dock No. 4, whose predecessor was the Pacific Bridge Company, for work in Honolulu. That same day he began work with Pearl Harbor Dry Dock. He continued to work regularly, although, as he testified at the hearings before the Deputy Commissioner, "not steadily" in that he took off work whenever possible to rest his back which still troubled him. On January 13, for the first time since December 2, he attempted to engage in a lifting operation. As he assisted in turning over a concrete form, his foot slipped in some grease and he was immediately seized with severe pain in his back and down his right leg. Later in the day he was examined by a physician who decided he had suffered a rupture of some sort and recommended that he be returned to the mainland for treatment. Laird continued to work as best he could until January 28. About the first of February he sailed for the United States. After his arrival in California, he did no work for about a month. From March 30 until June 4 he performed light work on the assembly line at Northrup Aviation. His back continued to cause him extreme discomfort and, during this period, he was absent from work a total of almost three weeks. On June 3, he was examined by his own physician who found a rupture of an intervertebral disc in his back. The ruptured disc was surgically removed on July 9. After the operation Laird improved. The pain in his leg ceased, but his back remained weak and continued to pain him at times.

On November 4, 1942, after several hearings, the

Deputy Commissioner ordered Pacific Naval Air Bases to compensate Laird for the week's disability following the first back strain. He found that the periods of partial and total disability following the second back strain and the existing total disability were the joint result of two injuries, and ordered that weekly compensation, which had accrued and which would subsequently fall due, should be divided equally between the two employers. When the insurance carriers of the two employers had jointly paid $7,500, they petitioned for an order terminating compensation. The petition was denied and this proceeding followed.

Although Section 14m may be ambiguous on its face, it is clear that if it is to have any force at all, it must at least limit to $7,500 the compensation payable for disability resulting from a specific damage to a particular body part. When bodily damage is attributed to an occupational disease (an occupational disease being considered an injury under the Act), many, if not innumerable physical events, may be in the stream of causation. But to interpret Section 14m to mean that the maximum compensation stated should be multiplied by the number of events contributing to the disease would be completely unreasonable. It is equally so when the bodily damage is of traumatic origin, even though in the latter case, the events contributing to the damage may be more discernibly separable.

Dr. Mark A. Glaser who examined Laird on September 8, 1942 at the request of plaintiff, Liberty

Mutual Insurance Co., stated in his report that "in view of the history of these two injuries it is further my opinion the first injury caused a beginning weakness of the ligaments supporting the nucleus and the second injury completed the relaxation of the ligaments. These two injuries together resulted in such a relaxation of the ligaments supporting the nucleus that a gradual complete rupture occurred. As a matter of fact a ruptured intravertebral (sic) disc may occur without injury and be due to a degenerative process. I do not see how any surgeon can place the cause of a ruptured intravertebral disc upon either of these injuries to the exclusion of the other when we know these ruptures may occur spontaneously without the history of injury."

The evidence without conflict shows that the rupture of the intervertebral disc was caused by at least two events—two strains, close in point of time. Each strain may have caused distinct bodily harm in the sense that, after each, body cells, theretofore sound were damaged. But the effect of the first strain was still present when the second occurred, and, in the end, the injury was of a unitary nature. Indeed it is doubtful that it would have been otherwise contended, had Laird not had two different employers.

It is my opinion that the Congress did not intend that a workman, disabled by a rupture resulting from a series of strains, should receive more compensation than a workman disabled by a rupture complete, as a result of a single event. Each stress

or strain which plays a part in a single injury cannot be made the basis for increasing the maximum compensation allowable under the Act.

Since the record is clear that the injury was single, there is no legal justification for doubling the maximum award.

The Commissioner was in error in denying the petition to terminate compensation. His order is set aside and it is Ordered that compensation be terminated.

Dated: September 9, 1949.

/s/ LEWIS GOODMAN,
U.S. District Judge.

[Endorsed]: Filed September 9, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Warren H. Pillsbury, as Deputy Commissioner, 13th Compensation District, Bureau of Employees' Compensation, Federal Security Agency, one of the defendants in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order of the United States District Court, dated September 9, 1949, setting aside the Compensation Order made by the defendant, Warren H. Pillsbury, as Deputy Commissioner, dated December 1, 1948, and made pursuant to the provisions of Section 21(b) of the Longshoremen's and Harbor

Workers' Compensation Act of March 4, 1927 (44 Stat. 1424) 33 USCA, Section 921 B, as made applicable to persons employed at certain defense bases under certain Public Works Contracts by the Act of August 16, 1941 (55 Stat. 622) USCA, Section 1654, and from the order of the Court denying the defendant's motion to dismiss the complaint for an injunction against defendants, and from the whole of said judgment and each and every part thereof on all questions of law; and the order of the Court filed on September 9, 1949, setting aside the Compensation Order filed by the defendant, Deputy Commissioner, on December 1, 1948.

Dated: November 3, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney,
Attorneys for
Defendants.

[Endorsed]: Filed November 3, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Defendant, Warren H. Pillsbury, as Deputy Commissioner, hereby designates that the whole of the record, proceedings and evidence be contained in the record on appeal herein, including the certified copy of the transcript of the record and proceedings, before said Warren H. Pillsbury, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency.

Dated: November 2, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney,
Attorneys for
Defendant.

[Endorsed]: Filed November 3, 1949.

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District

Case No. DB-P-1-715

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act as extended by Act of Congress of August 16, 1941 (Defense Bases Act)

FRED F. LAIRD,

Claimant,

against

CONTRACTORS PACIFIC NAVAL AIR BASES, Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Insurance Carrier.

CERTIFICATION OF RECORD

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the Federal Security Agency, Bureau of Employees' Compensation under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Compensation Act (Act of Congress of August 16th, 1941) for the Thirteenth Compensation District, comprising the State of California and other portions of the United States:

That there has recently been pending before me as said Deputy Commissioner, a claim for com-

pensation benefits transferred to me under said Acts from the Pacific Compensation District of Fred F. Laird against Contractors Pacific Naval Air Bases, employer and Liberty Mutual Insurance Company, insurance carrier, my file No. DB-P-1-715.

That the attached are originals or true and correct copies of pleadings and decisions in said file, as listed below, being a copy of the entire claim file therein as far as relevant to a review of the above proceeding:

(1) US-203, Employees' Claim for Compensation.

(2) Compensation Order, Award of Compensation, dated November 4th, 1942.

(3) Petition for termination of liability under Compensation Order dated November 4th, 1942.

(4) Order Denying Petition for Termination of Liability and Fixing Attorney's Fee dated December 1st, 1948.

(5) Corrected Order Denying Petition for termination of Liability and Fixing Attorney's Fee dated December 14, 1948.

Given under my hand at San Francisco, California, this 17th day of February, 1949.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:ml

Form US-203

DB-P-1-715
Case No. BA-8

Federal Security Agency
Bureau of Employees' Compensation
Office of Deputy Commissioner
Warren H. Pillsbury

Administering Longshoremen's and Harbor Workers' Compensation Act

Employee's Claim For Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law.)

Injured Person

1. Name of employee Fred F. Laird. Employee's check No. 75.

2. Address: Street and No. 608 E 67th Street. City or town Inglewood, Calif.

3. Sex Male. Age 31. Married, single, widowed Married.

4. Do you speak English? yes. Nationality American.

5. State regular occupation Carpenter & Carpenter-Foreman.

6. What were you doing when injured? Carpentering.

7. (a) Wages or average earnings per day, $11.00 (Include overtime, board, rent, and other

allowances.) (b) Per week, $84.00. (c) Were you empoyed elsewhere during week in which you were injured? No. (d) If so, state where and when .....

8. Were you paid full wages for day of accident? Yes.

Employer

9. Employer Hawaiian Dredging Company.

10. Office address: Street and No. .... City or town Honolulu, T.H.

11. Nature of business Construction.

The Injury

12. Place where injury occurred Near Carpenter Shop, Johnston Isle, T.H.

(Give place and name of vessel.)

13. Name of foreman Leroy Decker.

14. Date of accident or first illness, the 2 day of Dec., 1941, at 11:00 o'clock A.M.

15. How did accident happen or how was occupational disease caused? Lifting Steel Derrick.

Nature and Extent Of Injury

16. State fully nature of injury or occupational disease: Sacro-iliac slip with pain in back across right hip, and down right leg.

17. On what date did you stop work because of injury? December 3, 1941.

18. Have you returned to work? (Yes or No) Yes. If "yes," on what date? Dec. 13, 1941.

19. Does injury keep you from work? (Yes or No) Yes.

20. Have you done any work in period of disability? Yes.

21. Have you received any wages since injury? Yes. If so, from and to what date? From December 13, 1941 to Jan. 28, 1942 from March 30, 1942 to June 3, 1942.

22. Has injury resulted in amputation? no. If so, describe same Operation.

23. Did you request your employer to provide medical attendance? yes. Has he done so? yes.

24. Attending physician: Name Male nurse. Address Johnston Isle, T.H.

25. Hospital: Name......... Address.........

Notice

26. Have you given your employer notice of injury? (Yes or No) yes. When? Dec. 2, 1941.

27. If such notice was given, to whom? Foreman and Male nurse.

28. Was it given orally or in writing? Orally.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of

my employment and not occasioned solely by intoxication, or by my willful intention, and in support of of it I make the foregoing statement of facts.

/s/ FRED F. LAIRD,
Claimant.

Mail address 608 E. 67th St., Inglewood, Calif., Orchard 7-8023.

Dated: July 30, 1942.

United States Emloyees' Compensation Commission
13th Compensation District

Case No. DB-P-1-715

In the matter of the claim for compensation under Act of Congress of August 16, 1941 extending the Longshoremen's and Harbor Workers' Compensation Act to employments on certain military, air and naval bases of the United States.

FRED F. LAIRD,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER—AWARD OF COMPENSATION

Claim for compensation having been filed herein under the Act of Congress of August 16th, 1941 for an injury occurring in the course of an employment on a military, air or naval base of the United States outside the continental United States, in the Pacific Compensation District, and said claim having been transferred to the undersigned Deputy Commissioner, Thirteenth Compensation District,

by the Deputy Commissioner of the said Pacific District at Honolulu, in the Territory of Hawaii, with the approval of the United States Employees' Compensation Commission, and such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings Of Fact

That on the 2nd day of December, 1941, the claimant above named was in the employ of the employer above named for the performance of service at a military base of the United States at Johnston Island, in the Pacific Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Act of Congress of August 16th, 1941, and that the liability of the employer for compensation under said Acts was insured by Liberty Mutual Insurance Company;

That on said day claimant herein, while performing service for the employer as a carpenter, sustained personal injury occurring in the course of and arising out of his employment and resulting in disability as follows: While helping with other men to move a steel derrick he strained his back, said injury causing, among other things, a beginning herniation of a nucleus pulposus in the low back;

That notice of injury was given within thirty days after the date of such injury, to the Deputy Commissioner and to the employer;

That the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act;

That the average annual earnings of the claimant herein at the time of his injury exceeded the maximum prescribed by said Act, his actual monthly wages at said time being $300.00;

That as the result of the injury sustained the claimant was wholly disabled beginning with December 5th to and including December 12th and he is entitled to 1-1/7 weeks compensation, $25.00 a week, for such disability, amounting to $28.57;

That claimant returned to Honolulu between December 5th, and December 12th and resumed work at Honolulu for Builders Pearl Harbor Dock No. 4, insured in the United States Fidelity and Guaranty Company. On January 13th, 1942 he sustained further injury to his back while in the employ of said Builders Pearl Harbor Dock No. 4 which aggravated and increased the disabling condition initiated on December 2nd, 1941 at Johnston Island. That compensation and medical expense for disability after January 13th should be shared equally between defendants herein and Builders Pearl Harbor Dry Dock No. 4 and its insurance carrier, United States Fidelity and Guaranty Company. Award is herein made against defendants herein for one half of such compensation as stated below, and

simultaneously in the case of Fred Laird vs. Builders Pearl Harbor Dry Dock No. 4 and the United States Fidelity and Guaranty Company for the remaining 50 per cent of said compensation, said compensation order being made a part hereof;

That since January 13th, 1942 claimant has been disabled from labor by reason of the joint effect of the two injuries mentioned above as follows: (1) Total disability from January 28th, when claimant's wages ceased, to and including March 29th, 1942, 8-4/7 weeks, for which claimant is entitled to compensation at $25.00 a week, amounting to $214.28; (2) From March 30th to and including June 15th, less three weeks during which claimant was wholly unable to work on account of said condition, claimant worked at lighter work in California with partial disability at $36.00 a week. His loss of wage earning capacity during said working period was $33.23 a week and claimant is entitled to compensation therefor at $22.15 a week. Compensation accrued during said period of partial disability, 8-1/7 weeks, $180.36, and for total disability $75.00, a total of $255.36;

(3) From June 16th claimant has been wholly disabled indefinitely by reason of said injury. Compensation accrued to the date of the last hearing, October 5th, 1942, 16 weeks at $25.00 a week, is $400.00;

That claimant procured one or more operations on his spine by a physician of his own choice after

arriving in California, after notice and opportunity to defendants to provide said surgery, of which they did not avail themselves. That defendants are liable for one-half of the reasonable expense of said treatment, the reasonable amount of such medical expenses to be fixed by further proceedings herein if the parties are unable to agree thereon;

That the entire compensation accrued to the date of the last hearing, October 5th, 1942, assessable against defendants herein is $463.39. Payments made thereon, $100.00. Balance due claimant as of said date, $363.39;

That claimant's attorney, C. L. Blek, has rendered legal service to claimant in the prosecution of his claim, a fee for which is approved in the sum of $60.00, and he is entitled to a lien therefor upon compensation herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

Award

That the employer, Contractors Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant compensation as follows: To claimant the sum of $363.39 forthwith as of October 5th, 1942, less however, the sum of $60.00 to be deducted therefrom and paid to claimant's attorney, Mr. C. L. Blek, on his lien for attorney's fee, and the further sum to claimant for $12.50 a week thereafter until the ter-

mination of his disability or the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 4th day of November, 1942.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:eb/ml

United States Employees' Compensation Commission, 13th Compensation District

Case No. DB-8—Claim No. DB-13

In the matter of the claim for compensation under Act of Congress of August 16, 1941 extending the Longshoremen's and Harbor Workers' Compensation Act to employments on certain military, air and naval bases of the United States.

FRED F. LAIRD,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer,

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier.

PETITION FOR TERMINATION OF LIABILITY UNDER COMPENSATION ORDER DATED NOVEMBER 4, 1942

The defendant employer and insurance carrier above named hereby petition for termination of liability under compensation order dated November 4, 1942, for the following reasons and upon the following grounds;

I.

The claimant at present is allegedly suffering (a)

from a disability to his back produced as the result of an injury sustained on the 2nd day of December, 1941, while in the employ of Contractors, PBAB, (Liberty Mutual Insurance Company, compensation insurance carrier) on Johnson Island, which said injury was aggravated and the disability increased as the result of (b) an injury to his back sustained on January 13, 1942, while employed as a carpenter at Pearl Harbor, by Builders, Pearl Harbor, Dock No. 4 (United States Fidelity & Guaranty Company, compensation insurance carrier).

The claimant filed his separate claims for compensation against both employers and their respective carriers and following hearings on said claims, which were consolidated for the purpose of said hearings, the deputy Commissioner issued two separate compensation orders dated November 4, 1942, with respect to both claimed injuries.

(a) In the compensation order in the case of Fred F. Laird vs. Contractors, PNAB, and Liberty Mutual Insurance Company, case No. DB-8, Claim No. DB-13, the Deputy Commissioner found that on December 2, 1941, the claimant sustained personal injury occurring in the course of and arising out of his employment by Contractors, PNAB, on Johnson Island, and further in said compensation order dated November 4, 1942, the Deputy Commissioner found that on January 13, 1942, the said claimant sustained further injury to his back while in the employ of Builders, Pearl Harbor Dock No. 4, which aggravated and increased the disabling con-

dition initiated on December 2, 1941, at Johnson Island; and further in said compensation order November 4, 1942, the Deputy Commissioner found that compensation and medical expense for disability after January 13, 1942 should be shared equally between the defendants, Contractors, PNAB and its compensation insurance carrier, Liberty Mutual Insurance Company. In this same compensation order, November 4, 1942, the Deputy Commissioner made an award against defendants Contractors, PNAB and Liberty Mutual Insurance Company for one-half of such compensation and "simultaneously in the case of Fred Laird vs. Builders, Pearl Harbor Dry Dock No. 4" and its compensation insurance carrier, the United States Fidelity & Guaranty Company" for the remaining 50 per cent of said compensation, such compensation order being made a part hereof."

This award against the defendants, Contractors, PNAB and Liberty Mutual Insurance Company, calls for the payment of $12.50 a week, which is one-half of the maximum compensation of $25.00 allowable under the Longshoremen's and Harbor Workers' Act, as amended by the Naval Bases Act.

(b) In the compensation order in the case of Fred F. Laird vs. Builders, Pearl Harbor Dock No. 4, and United States Fidelity and Guaranty Company, case No. DB-8, Claim No. DB-13, the Deputy Commissioner found that on the 13th day of January, 1942, the claimant sustained personal injury occurring in the course of and arising out

of his employment by Builders, Pearl Harbor Dry Dock No. 4.

The Deputy Commissioner further found that said injury of January 13, 1942, aggravated and increased disability from which claimant was already suffering in his back by reason of injury sustained December 2, 1942 at Johnson Island while in the employ of Contractors, PNAB, insured by Liberty Mutual Insurance Company. The Deputy Commissioner further found that the liability for compensation for said condition of claimant's back from and after January 13, 1942 should be borne equally between the defendants, Builders, Pearl Harbor Dry Dock Nó. 4 and United States Fidelity and Guaranty Company and Contractors, PBAB and Liberty Mutual Insurance Company.

Each of the two compensation orders above referred to has incorporated therein the compensation order issued in the other claim and by reference is made a part thereof.

Pursuant to the provisions of the compensation order, November 4, 1942, against Liberty Mutual Insurance Company, as compensation insurance carrier for Contractors, PNAB, has paid the sum of $3,750.00 as compensation to the claimant, and pursuant to the award of November 4, 1942, the said United States Fidelity and Guaranty Company, as compensation insurance carrier for Builders, Pearl Harbor Dry Dock No. 4, has likewise paid the sum of $3,750.00 as compensation to the claimant. Thus, the claimant herein has received

from the two defendant insurance carriers, and in conformity with the provisions of said compensation orders, a total of $7,500.00, which is the maximum sum payable for injury under the provisions of Section 914 (m) of the Longshoremen's and Harbor Workers' Compensation Act as amended by the Naval Bases Act.

The defendants, Contractors, PNAB and Liberty Mutual Insurance Company therefore pray for a compensation order relieving and releasing said Contractors, PNAB and Liberty Mutual Insurance Company, of and from any further or other liability for the payment of compensation on the ground that the sum of $7,500.00, the maximum sum allowable under the Federal Act as above cited, has been paid to the claimant for the disability from which he now allegedly suffers as the result of the original injury December 2, 1941 and the aggravating injury of January 13, 1942.

II.

The defendant, Contractors, PNAB and Liberty Mutual Insurance Company, petition for an order terminating liability and disability on the further ground that for a long period of time prior to the date hereof, the claimant has had continued and substantial earnings as the owner and/or proprietor of a vegetable stand and that for a long period of time prior to the date hereof his earnings have been in excess of those which he was earning as of the date of Injury, December 2, 1941.

The defendants petition for termination of liability and disability for the reasons set forth in paragraph 2 hereof, and is based upon Section 922 of the Longshoremen's and Harbor Workers' Compensation, on the ground of a change in conditions.

Dated at Los Angeles, California, October 29, 1948.

Respectfully submitted,
TIPTON & WEINGAND,
By CLAUDE F. WEINGAND,
Attorney for Petitioners.

Federal Security Agency, Bureau of Employees Compensation, 13th Compensation District

Case No. DB-P-1-715

In the matter of the claim for compensation under the Acts of Congress of August 16, 1941 and December 2, 1942, extending the Longshoremen's and Harbor Workers' Compensation Act.

FRED F. LAIRD,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER

ORDER DENYING PETITION FOR TERMINATION OF LIABILITY UNDER AWARD AND FIXING ATTORNEY'S FEE

Compensation Order having been entered herein on November 4th, 1942 and supplemented by an order of April 16th, 1943 fixing medical expenses, and by an order of September 16th, 1946 denying petition for termination of liability, and said orders having divided the weekly payment of $25.00 a week due for claimant's continuing partial disability

between defendants herein and defendants in file DB-P-61-65, Laird vs. Pacific Bridge Company and United States Fidelity & Guaranty Company, employer and insurance carrier at the time of a later injury which increased the disability initiated by claimant's injury herein, and defendants herein having now applied for termination of their liability upon the ground that payments to date by Liberty Mutual Insurance Company and United States Fidelity & Guaranty Company have together exceeded the sum of $7,500.00, and also upon the ground that claimant is not now suffering any loss of wage earning capacity as a result of his injury of December 2nd, 1941, and hearing having been held thereon and the matter submitted for decision, and the Deputy Commissioner being of opinion that the liability of defendants herein, Contractors Pacific Naval Air Bases and Liberty Mutual Insurance Company, under Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act extends to a maximum limit of $7,500.00 for each of claimant's injuries separately and that the payments made by said defendants have not yet reached said sum, and said petition for termination of liability not alleging any change in claimant's physical condition, and the evidence adduced at said hearing having failed to show that claimant's earning capacity has increased since the last preceding order to a sufficient extent to permit reduction of claimant's compensation rate, and it further appearing that claimant's attorney, C. L.

Blek, has rendered legal services to claimant in this case and in case No. DB-P-61-65 since the entry of the last preceding order for which a fee is requested and that a fee should be approved in the sum of $100.00 to be divided equally between said two injuries and that a lien should be granted herein for the sum of $50.00 against compensation due from defendant, Liberty Mutual Insurance Company.

It Is Hereby Ordered that the petition herein for termination of defendant's liability be and the same is hereby Denied and that defendants pay to claimant's attorney, C. L. Blek, upon his lien for attorney's fee, the sum of $50.00, deducting the same from compensation payments due claimant herein.

Given under my hand at San Francisco, California, this 1st day of December, 1948.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:el/ml

Federal Security Agency, Bureau of Employees Compensation, 13th Compensation District

Case No. DB-P-1-715

In the matter of the claim for compensation under the Acts of Congress of August 16, 1941 and December 2, 1942, extending the Longshoremen's and Harbor Workers' Compensation Act.

FRED F. LAIRD,

Claimant,

against

BUILDERS PEARL HARBOR, DOCK #4,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER—ORDER DENYING PETITION FOR TERMINATION OF LIABILITY UNDER AWARD AND FIXING ATTORNEY'S FEE. (Corrected)

Compensation Order having been entered herein on November 4th, 1942 and supplemented by an order of April 16th, 1943 fixing medical expenses, and by an order of September 16th, 1946 denying petition for termination of liability, and said orders having divided the weekly payment of $25.00 a week due for claimant's continuing partial disability between defendants herein and defendants in file DB-P-61-65, Laird vs. Pacific Bridge Company and United States Fidelity & Guaranty Company, em-

ployer and insurance carrier at the time of a later injury which increased the disability initiated by claimant's injury herein, and defendants herein having now applied for termination of their liability upon the ground that payments to date by Liberty Mutual Insurance Company and United States Fidelity & Guaranty Company have together exceeded the sum of $7,500.00, and also upon the ground that claimant is not now suffering any loss of wage earning capacity as a result of his injury of December 2nd, 1941, and hearing having been held thereon and the matter submitted for decision, and the Deputy Commissioner being of opinion that the liability of defendants herein, Builders Pearl Harbor, Dock #4 and Liberty Mutual Insurance Company, under Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act extends to a maximum limit of $7,500.00 for each of claimant's injuries separately and that the payments made by said defendants have not yet reached said sum, and said petition for termination of liability not alleging any change in claimant's physical condition, and the evidence adduced at said hearing having failed to show that claimant's earning capacity has increased since the last preceding order to a sufficient extent to permit reduction of claimant's compensation rate, and it further appearing that claimant's attorney, C. L. Blek, has rendered legal services to claimant in this case and in case No. DB-P-61-65 since the entry of the last preceding order for which a fee is requested and that a fee

should be approved in the sum of $100.00 to be divided equally between said two injuries and that a lien should be granted herein for the sum of $50.00 against compensation due from defendant, Liberty Mutual Insurance Company.

It Is Hereby Ordered that the petition herein for termination of defendant's liability be and the same is hereby Denied and that defendants pay to claimant's attorney, C. L. Blek, upon his lien for attorney's fee, the sum of $50.00 deducting the same from compensation payments due claimant herein.

Given under my hand at San Francisco, California, this 14th day of December, 1948.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:el/ml/s

Federal Security Agency, Bureau of Employees Compensation, 13th Compensation District

Case No. DB-P-61-65

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act as extended by Act of Congress of August 16, 1941 (Defense Bases Act).

FRED F. LAIRD,

Claimant,

against

PACIFIC BRIDGE COMPANY,

Employer,

U. S. FIDELITY AND GUARANTY COMPANY,

Insurance Carrier.

CERTIFICATION OF RECORD

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the Federal Security Agency, Bureau of Employees' Compensation under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Compensation Act (Act of Congress of August 16th, 1941) for the Thirteenth Compensation District, comprising the State of California and other portions of the United States:

That there has recently been pending before me as said Deputy Commissioner, a claim for compensation benefits transferred to me under said Acts

from the Pacific Compensation District of Fred F. Laird against Pacific Bridge Company, employer and United States Fidelity and Guaranty Company, insurance carrier, my file No. DB-P-61-65.

That the attached are originals or true and correct copies of pleadings and decisions in said file, as listed below, being a copy of the entire claim file therein as far as relevant to a review of the above proceeding:

(1) US-203, Employees' Claim for Compensation

(2) Compensation Order, Award of Compensation, dated November 4th, 1942

(3) Petition for termination of Liability under Compensation Order dated November 4th, 1942

(4) Order Denying Petition for Termination of Liability and Fixing Attorney's Fee dated December 1st, 1948

Given under my hand at San Francisco, California, this 17th day of February, 1949.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:ml

Form US-203

Federal Security Agency
Bureau of Employees' Compensation

Office of Deputy Commissioner Warren H. Pillsbury
Administering Longshoremen's and Harbor
Workers' Compensation Act

BP. 61-65
Case No. DB-8B

Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON

1. Name of employee: Fred F. Laird, Employee's check No. 943.

2. Address: Street and No., 608 E. 67 St. City or town: Englewood, Calif.

3. Sex: Male. Age: 31. Married, single, widower: Married.

4. Do you speak English? Yes. Nationality: American.

5. State regular occupation: Carpenter Foreman.

6. What were you doing when injured? Carpentering.

7. (a) Wages or average earnings per day, $16.37.5 (include overtime, board, rent, and other

allowances.) (b) Per week, $114.62. (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when:

8. Were you paid full wages for day of accident? Yes.

EMPLOYER

9. Employer: Pacific Bridge Company.

10. Office address: Street and No., Pearl Harbor. City or town: Honolulu, T. H.

11. Nature of business: Construction Dry Dock #4.

THE INJURY

12. Place where injury occurred: Near Dry Dock #4.

13. Name of foreman: Fred Toft, Supt.

14. Date of accident or second illness, the 13th day of January, 1942, at 9 o'clock a.m.

15. How did accident happen or how was occupational disease caused? Lifting cement form.

NATURE AND EXTENT OF INJURY

16. State fully nature of injury or occupational disease: Pain in back, across right hip and down right leg.

17. On what date did you stop work because of injury? January 28, 1942.

18. Have you returned to work? (Yes or No): Yes. If "yes," on what date? March 30, 1942.

19. Does injury keep you from work? (Yes or No): Yes.

20. Have you done any work in period of disability? Yes.

21. Have you received any wages since injury? Yes. If so, from and to what date? Jan. 13, to January 28, 1942. From March 30, to June 3, 1942.

22. Has injury resulted in amputation? No. If so, describe same: Operation.

23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes.

24. Attending physician: Name, Alsup Clinic. Address, Honolulu, T. H.

NOTICE

26. Have you given your employer notice of injury? (Yes or No) Yes. When? Jan. 13, 1942.

27. If such notice was given, to whom? Time Keeper.

28. Was it given orally or in writing? Orally.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxi-

cation, or by my willful intention, and in support of it I make the foregoing statement of facts.

Dated July 30, 1942.

Filed 8/8/42.

/s/ FRED F. LAIRD,
Claimant.

Mail address: 608 E 67th St., Inglewood, Calif., Phone OR. 7-8023.

United States Employees' Compensation Commission, 13th Compensation District

Case No. DB-8—Claim No. DB-13

DB-P-61-65

In the matter of the claim for compensation under the Act of Congress of August 16, 1941 extending the Longshoremen's and Harbor Workers' Compensation Act to employments on certain military, air and naval bases of the United States.

FRED F. LAIRD,

Claimant,

against

BUILDERS, PEARL HARBOR DOCK NO. 4,

Employer,

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier.

COMPENSATION ORDER—AWARD OF COMPENSATION

Claim for compensation having been filed herein under the Act of Congress of August 16th, 1941 for an injury occurring in the course of an employment on a military, air or naval base of the United States outside the continental United States, in the Pacific Compensation District, and said claim having been

transferred to the undersigned Deputy Commissioner, Thirteenth Compensation District, by the Deputy Commissioner of said Pacific District at Honolulu, in the Territory of Hawaii, with the approval of the United States Employees' Compensation Commission, and such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 13th day of January, 1942, the claimant above named was in the employ of the employer above named for the performance of service at a military base of the United States at Pearl Harbor in the Territory of Hawaii, in the Pacific Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Act of Congress of August 16th, 1941, and that the liability of the employer for compensation under said Acts was insured by United States Fidelity and Guaranty Company;

That on said day claimant herein, while performing service as a carpenter for defendant Pearl Harbor Dry Dock No. 4, sustained personal injury occurring in the course of and arising out of his employment and resulting in disability as follows: While attempting to turn over certain forms and in lifting a form, claimant's foot slipped on some

grease, causing him to sustain a strain of the back. Said strain aggravated and increased disability from which claimant was already suffering in his back, consisting of an incipient herniation of a nucleus pulposus of the lower spinal column which claimant had sustained by injury of December 2nd, 1942 at Johnston Island while in the employ of Contractors, Pacific Naval Air Bases, insured against liability under said Acts in Liberty Mutual Insurance Company. That the liability for compensation for said condition of claimant's back from and after January 13th, 1942 should be apportioned equally between defendants herein and the defendants in said proceeding mentioned above. The compensation order therein is incorporated in this compensation order by this reference and made a part hereof;

That notice of injury was given within thirty days after the date of such injury, to the Deputy Commissioner and to the employer;

That the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act, until claimant's return to California. After arriving in California claimant procured one or more operations on his spine by a physician of his own choice, after notice and opportunity to defendants to provide said surgery, of which they did not avail themselves. That defendants are liable for one-half the reasonable amount of claimant's medical expenses, to be fixed by further proceedings herein if the parties are unable to agree thereon;

That the average annual earnings of the claimant herein exceeded the maximum sum prescribed by said Act of $1950.00, claimant's actual wages being $100 a week;

That as a result of his injury sustained claimant was wholly disabled, beginning with January 28th, 1942, when his wages ceased, to and including March 29th, 1942, 8-4/7 weeks, for which claimant is entitled to compensation at $25.00 a week, amounting to $214.28;

That from March 30th to and including June 15th, less 3 weeks during which claimant was wholly unable to work because of said disability claimant worked with partial disability at lighter work in California at $36.00 a week. His loss of wage earning capacity during said period was $64.00. That claimant is entitled to compensation therefor at $25.00 a week. Compensation accrued during said period of partial disability, 8-1/7 weeks, is $203.57, which, with the 3 weeks period of total disability mentioned above, $25.00 a week, makes a total of $278.57;

From June 16 claimant has been wholly disabled indefinitely by reason of said injury. Compensation accrued to the date of the last hearing, October 5th, 1942, 16 weeks at $25.00 a week, is $400.00.

That the entire compensation accrued to the date of the last hearing, October 5th, 1942, assessable against defendants herein, is $446.42. Payments thereon, $100.00. Balance due as of said date $346.42;

That claimant's attorney, C. L. Blek, has rendered legal service to claimant in the prosecution of his claim, a fee for which is approved in the sum of $60.00, and he is entitled to lien therefor upon compensation herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

Award

That the employer, Builders, Pearl Harbor Dry Dock No. 4, and the insurance carrier, United States Fidelity and Guaranty Company, shall pay to the claimant compensation as follows: The sum of $346.42 forthwith as of October 5th, 1942, less, however, the sum of $60.00 to be deducted therefrom and paid to claimant's attorney, C. L. Blek, upon his lien for attorney's fee.

To claimant the further sum of $12.50 per week, payable each two weeks beginning with October 6th, 1942, and payable at said rate until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 4th day of November, 1942.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:EB

United States Employers' Compensation Commission, 13th Compensation District

(Copy)

Case No. DB-8—Claim No. DB-13

In the matter of the claim for compensation under Act of Congress of August 16, 1941 extending the Longshoremen's and Harbor Workers' Compensation Act to employments on certain military, air and naval bases of the United States.

FRED F. LAIRD,

Claimant,

against

BUILDERS, PEARL HARBOR DOCK NO. 4,

Employer,

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier.

PETITION FOR TERMINATION OF LIABILITY UNDER COMPENSATION ORDER DATED NOVEMBER 4, 1942

The defendant employer and insurance carrier above named hereby petition for termination of liability under compensation order dated November 4, 1942, for the following reasons and upon the following grounds:

I.

The claimant at present is allegedly suffering (a) from a disability to his back produced as the result

of an injury sustained on the 2nd day of December, 1941, while in the employ of Contractors, PNAB, (Liberty Mutual Insurance Company, compensation insurance carrier) on Johnson Island, which said injury was aggracated and the disability increased as the result of (b) an injury to his back sustained on January 13, 1942, while employed as a carpenter at Pearl Harbor, by Builders, Pearl Harbor Dock No. 4 (United Fidelity & Guaranty Company, compensation insurance carrier).

The claimant filed his separate claims for compensation against both employers and their respective carriers and following hearings on said claims, which were consolidated for the purpose of said hearings, the Deputy Commissioner issued two separate compensation orders dated November 4, 1948, with respect to both claimed injuries.

(a) In the compensation order in the case of Fred F. Laird vs Contractors, PNAB, and Liberty Mutual Insurance Company, case No. DB-8, Claim No. DB-13, the Deputy Commissioner found that on December 2, 1941, the claimant sustained personal injury occurring in the course of and arising out of his employment by Contractors, PNAB, on Johnson Island, and further in said compensation order dated November 4, 1942, the Deputy Commissioner found that on January 13, 1942, the said claimant sustained further injury to his back while in the employ of Builders, Pearl Harbor Dock No. 4, which aggravated and increased the disabling condition initiated on December 2, 1941, at Johnson

Island; and further in said compensation order November 4, 1942, the Deputy Commissioner found that compensation and medical expense for disability after January 13, 1942 should be shared equally between the defendants, Contractors, PNAB and its compensation insurance carrier, Liberty Mutual Insurance Company. In this same compensation order, November 4, 1942, the Deputy Commissioner made an award against defendants Contractors, PNAB and Liberty Mutual Insurance Company for one-half of such compensation and "simultaneously in the case of Fred Laird vs Builders, Pearl Harbor Dry Dock No. 4" and its compensation insurance carrier, the United States Fidelity & Guaranty Company "for the remaining 50 per cent of said compensation, such compensation order being made a part hereof."

This award against the defendants, Contractors, PNAB and Liberty Mutual Insurance Company, calls for the payment of $12.50 a week, which is one-half of the maximum compensation of $25.00 allowable under the Longshoremen's and Harbor Workers' Act, as amended by the Naval Bases Act.

(b) In the compensation order in the case of Fred F. Laird vs Builders, Pearl Harbor Dock No. 4, and United States Fidelity and Guaranty Company, case No. DB-8, Claim No. DB-13, the Deputy Commissioner found that on the 13th day of January, 1942, the claimant sustained personal injury occurring in the course of and arising out of his employment by Builders, Pearl Harbor Dry Dock No. 4.

The Deputy Commissioner further found that said injury of January 13, 1942, aggravated and increased disability from which claimant was already suffering in his back by reason of injury sustained December 2, 1942 at Johnson Island while in the employ of Contractors, PNAB, insured by Liberty Mutual Insurance Company. The Deputy Commissioner further found that the liability for compensation for said condition of claimant's back from and after January 13, 1942 should be borne equally between the defendants, Builders, Pearl Harbor Dry Dock No. 4 and United States Fidelity and Guaranty Company and Contractors, PNAB and Liberty Mutual Insurance Company.

Each of the two compensation orders above referred to has incorporated therein the compensation order issued in the other claim and by reference is made a part thereof.

Pursuant to the provisions of the compensation order, November 4, 1942, against Liberty Mutual Insurance Company, as compensation insurance carrier for Contractors, PNAB, has paid the sum of $3,750.00 as compensation to the claimant, and pursuant to the award of November 4, 1942, the said United States Fidelity and Guaranty Company, as compensation insurance carrier for Builders, Pearl Harbor Dry Dock No. 4. has likewise paid the sum of $3,750.00 as compensation to the claimant. Thus, the claimant herein has received from the two defendant insurance carriers, and in conformity with the provisions of said compensation

orders, a total of $7,500.00 which is the maximum sum payable for injury under the provisions of Section 914 (m) of the Longshoremen's and Harbor Workers' Compensation Act as amended by the Naval Bases Act.

The defendants, Builders, Pearl Harbor Dock No. 4, and United States Fidelity and Guaranty Company therefore pray for a compensation order relieving and releasing said Builders, Pearl Harbor Dock No. 4 and United States Fidelity and Guaranty Company, of and from any further or other liability for the payment of compensation on the ground that the sum of $7,500.00, the maximum sum allowable under the Federal Act as above cited, has been paid to the claimant for the disability from which he now allegedly suffers as the result of the original injury of December 2, 1941 and the aggravating injury of January 13, 1942.

II.

The defendants, Builders, Pearl Harbor Dock No. 4, and United States Fidelity and Guaranty Company, petition for an order terminating liability and disability on the further ground that for a long period of time prior to the date hereof, the claimant has had continued and substantial earnings as the owner and/or proprietor of a vegetable stand and that for a long period of time prior to the date hereof his earnings have been in excess of those which he was earning as of the date of injury, December 2, 1941.

The defendants petition for termination of liability and disability for the reasons set forth in paragraph 2 hereof, and is based upon Section 922 of the Longshoremen's and Harbor Workers' Compensation, on the ground of a change in conditions.

Dated at Los Angeles, California, October 29, 1948.

Respectfully submitted,

By VIRGIL L. BROWN,
Attorney for Petitioners.

Federal Security Agency, Bureau of Employees Compensation, 13th Compensation District

Case No. DB-P-61-65

In the matter of the claim for compensation under the Acts of Congress of August 16, 1941 and December 2, 1942, extending the Longshoremen's and Harbor Workers' Compensation Act.

FRED F. LAIRD,

Claimant,

against

PACIFIC BRIDGE COMPANY,

Employer,

UNITED STATES FIDELITY & GUARANTY CO.,

Insurance Carrier.

COMPENSATION ORDER—ORDER DENYING PETITION FOR TERMINATION OF LIABILITY UNDER AWARD, AND FIXING ATTORNEY'S FEE

Compensation Order having been entered herein on November 4th, 1942 and supplemented by an order of April 16th, 1943 fixing medical expenses, and by an order of September 16th, 1946 denying petition for termination of liability, and said orders having divided the weekly payment of $25.00 a week due for claimant's continuing partial disability between defendants herein and defendants in file

DB-P-1-715, Laird vs Contractors, Pacific Naval Air Bases and Liberty Mutual Insurance Company, employer and insurance carrier at the time of a former injury, which initiated disability which was later increased by claimant's injury herein, and defendants in the present proceeding having now applied for termination of their liability upon the ground that payments to date by them and by Liberty Mutual Insurance Company have together exceeded the sum of $7,500.00, and also upon the ground that claimant is not now suffering any loss of wage earning capacity as a result of his injury of January 13th, 1942, and hearing having been held thereon and the matter being submitted for decision, and the Deputy Commissioner being of opinion that the liability of defendants herein under Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act extends to a maximum limit of $7,500.00 for each of claimant's injuries separately and that the payments made by defendants herein, Pacific Bridge Company and United States Fidelity & Guaranty Company have not yet reached the sum of $7,500.00, and said petition for termination of liability not alleging any change in claimant's physical condition, and the evidence adduced at said hearing having failed to show that claimant's earning capacity has increased since the last preceding order to a sufficient extent to permit reduction of claimant's weekly compensation rate, and it further appearing that claimant's attorney, C. L. Blek, has rendered legal services to claimant

in this case and in case No. DB-P-1-715 since the entry of the last preceding order for which a fee is requested, and that a fee should be approved in the sum of $100.00 to be divided equally between said two files and that a lien should be granted herein for the sum of $50.00 upon compensation due from defendant, United States Fidelity & Guaranty Company.

It Is Hereby Ordered that the petition herein for termination of liability be and the same is hereby Denied, and that defendants pay to claimant's attorney, C. L. Blek, upon his lien upon compensation payments due claimant, Fred F. Laird, the sum of $50.00.

Given under my hand at San Francisco, California, this 1st day of December, 1948.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:el/ml

[Endorsed]: Filed August 5, 1949.

Federal Security Agency

Bureau of Employees' Compensation
13th Compensation District

CASES DB-P-61-65 and DB-P-1-715

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act as Extended by Act of Congress of August 16, 1941.

FRED F. LAIRD,

Claimant,

against

PACIFIC BRIDGE COMPANY, contractors Pacific Naval Air Bases,

Employers,

U. S. FIDELITY AND GUARANTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carriers.

CERTIFICATION OF TRANSCRIPTS OF TESTIMONY

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the Federal Security Agency, Bureau of Employees' Compensation under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Compensation Act (Act of Congress of August 16th, 1941) for the Thirteenth Compensation

District, comprising the State of California and other portions of the United States:

That there has recently been pending before me as said Deputy Commissioner, claims for compensation benefits transferred to me under said Acts from the Pacific Compensation District of Fred F. Laird, against Pacific Bridge Company and Contractors Pacific Naval Air Bases, Employers, and U. S. Fidelity and Guaranty Company and Liberty Mutual Insurance Company, insurance carriers;

That the attached are original transcripts of testimony and exhibits in said file, as listed below:

(1) Transcript of Testimony of August 4, 1942, with attached exhibits: Ex. "A", Report of G. Mosser Taylor, M.D., of July 6, 1942; Ex. "B", Report of Leslie C. Grant, M.D., of July 31, 1942; Ex. "C", Certification of H. O. Maxwell, Personnel Manager, Builders Pearl Harbor Dock, No. 4, dated Feb. 10, 1942.

(2) Transcript of Testimony of August 18, 1942, with attached exhibit: Ex. "A", Report of informal conference held in the office of the Deputy Commissioner, Pacific Compensation District, Saturday, February 14, 1942, at 12:00 noon.

(3) Transcript of Testimony of September 15, 1942.

(4) Transcript of Testimony of October 5, 1942, with attached exhibits: Ex. "A", Report of Dr. Mark A. Glaser of September 8, 1942; Ex. "B", Report of Fred F. Laird of July 7, 1942.

(5) Transcript of Testimony of September 13, 1943.

(6) Transcript of Testimony of October 18, 1943, with attached exhibits: Ex. "A", Report of Dr. Lawrence Chaffin of September 30, 1943; Ex. "B", Report of Carl W. Rand of October 4, 1943; Ex. "C", Letter from Department of Education, Bureau of Vocational Rehabilitation, of September 27, 1943.

(7) Transcript of Testimony of August 19, 1946, with attached exhibit: Ex. "A", Report of Dr. Christopher Mason of August 1, 1946.

(8) Transcript of Testimony of November 22, 1948.

Given under my hand at San Francisco, California, this 29th day of August, 1949.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th District.

whp:j

United States Employees' Compensation Commission

Before Warren H. Pillsbury, Deputy Commissioner 13th Compensation District

CASE No. ......

FRED LAIRD,

Claimant,

vs.

BUILDERS PEARL HARBOR DRY DOCK No. 4, and CONTRACTORS PNAB,

Employers,

U. S. FIDELITY & GUARANTY CO., LIBERTY MUTUAL INSURANCE CO.,

Insurance Carriers.

TRANSCRIPT OF TESTIMONY AT HEARING

August 4, 1942

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at State Industrial Accident Commission's Hearing Room, State Building, Los Angeles, on August 4, 1942, at 4:00 p.m.

APPEARANCES

MR. CLAUDE F. WEINGAND,

Attorney at Law, appearing for Liberty Mutual Insurance Co., 939 Rowan Bldg., Los Angeles.

Claimant present in person.

MR. F. W. BUNNETT and MR. HOGAN, Attys., appearing for U. S. Fideltity and Guaranty Co., Los Angeles, California.

Deputy Commissioner Pillsbury:

Hearing under the Military Bases Act, Act of Congress of August 16, 1941. The matter comes up today for partial testimony as an emergency. After informal conference at Los Angeles two weeks ago by telephone and otherwise with the parties, I had expressed the opinion that the matter would be regularly on for hearing for today. However, delay occurred in getting claim blanks to claimant and their return to my office. As a result the matter was not officially set for hearing. However, claimant made inquiries this morning as to the status of the case and without having the records before me the parties were notified informally and have consented insofar as emergency may require to taking testimony. Claimant states he has one witness, Mr. Nelson, who has come from San Francisco for giving evidence today and desires his testimony to be taken at this time.

It Is Stipulated it may be done. It Is Stipulated that the claim, which is not in my possession at this time, is twofold:

(1) Injury to the back sustained on December 2, 1941 while in the employ of Pacific Naval Air Bases at Johnston Island.

(2) Injury to the back while in the employ of Pacific Bridge Company at Pearl Harbor.

Claimant has stated that he was operated on several weeks ago for a spinal condition, probably a correction of a nucleas pulposis affair, and that today is his first day out. It Is Stipulated that the testimony of the witness Nelson may be taken at this time and that if the case has not yet been transferred to me from the Deputy Commissioner at Honolulu any transfer which may be made shall be retroactive and cover the testimony taken today.

H. D. NELSON

a witness called on behalf of Claimant, being first duly sworn by the Deputy Commissioner, testified as follows:

Direct Examination

By the Deputy Commissioner:

Q. What is your full name?

A. Hanford David Nelson.

Q. Your address Mr. Nelson?

A. 1450 - 28th Avenue, San Francisco.

Q. What is your occupation Mr. Nelson?

A. Carpenter.

Q. Do you know Mr. Fred Laird here?

A. I met Mr. Laird on Johnston Island when I arrived there in October.

Q. Did you work with him on Johnston Island?

A. I did on occasions, helping out. I got to know Mr. Laird quite well.

(Testimony of H. D. Nelson.)

Q. Did you also work with him at Pearl Harbor?

A. I worked at Pearl Harbor for Pacific Bridge Company one day.

Q. Did you see Mr. Laird while he was in Honolulu? A. Yes.

Q. Do you know of anything happening to Mr. Laird on Johnston Island?

A. He was moving a small derrick and I helped move it and I know he was given a slip from the Nurse Department to lay off a few days.

Q. Did you see him while he was helping with the derrick? A. Yes.

Q. Did anything happen to him at that time?

A. We were just lifting. As far as stumbling over, I don't recall anything like that.

Q. Tell me what you saw?

A. Mr. Laird straddled the derrick and partially raised it off the ground and dragged it out of the way.

Q. Did anything happen to him as far as you saw?

A. Nothing that I could notice at the moment. He didn't fall over or anything like that.

Q. Did he complain of any pain at that time?

A. He did. He doubled himself up.

Q. Was that at the time he was lifting or sometime afterwards?

A. That was shortly afterwards.

Q. How soon afterwards—a day or two?

A. No, it was the same afternoon. I went across

(Testimony of H. D. Nelson.)

the street to go back to my regular job. They asked me to give them a hand at moving the derrick and when I went back to my regular job that afternoon Mr. Laird——

Q. Tell me what you saw or what happened to Mr. Laird and any complaints he made.

A. We dragged this derrick out of the way and Mr. Laird went back to his job and I went across the street to mine and within an hour or so Mr. Laird was off work.

Q. You said something about his being doubled up.

A. He was favoring one side on his way to the office.

Q. Did you see him at that time? A. Yes.

Q. You say that was within an hour after you dragged the derrick. Did he say anything at that time about it?

A. I couldn't say because there was quite a little noise.

Q. Did you hear him say anything about having any pain?

A. Later on in the afternoon he complained about his side.

Q. And what did he say that you heard?

A. He just stated he had hurt his back and had a shooting pain across the back. (Indicating from the spine around the right side and down the front of the right leg a few inches)

Q. Just what did he say about it?

(Testimony of H. D. Nelson.)

A. Well somebody had evidently asked him what was wrong. He looked fairly pale and someone asked what was wrong and he said he had a severe pain in his side and he showed just where the pain was.

Q. You heard him say that? A. Yes, sir.

Q. In the course of that conversation did he say when the pain started or where he got the pain?

A. No, I don't recall his saying that. Of course he didn't come out and make a statement as far as I know.

Q. I just want to know what you heard him say.

A. I can't recall his exact words.

Q. Did he say anything to you or that you heard that day as to where he got the pain or how he got it?

A. He just figured he got it while working on the derrick.

Q. Did he say that?

A. I don't remember his exact words.

Q. I would like to get what he told you.

A. I don't remember his exact words. His indications were that he had hurt himself while dragging the small derrick there.

Q. Did you understand him to say in general words that he had hurt his side while working on the derrick?

A. The only thing he stated that the pain had come since he had lifted the derrick. He didn't come out and say "I hurt myself while lifting that

(Testimony of H. D. Nelson.)

derrick'', but he did say the pain developed since he lifted the derrick.

Q. Did you have any conversation with him since while you were working at Johnston Island?

A. Every once in a while I would ask him how he was. Then he was off work and you could tell from his walking around——

Q. Did he tell you at any later conversation on Johnston Island how the pain started or how he got the pain?

A. No, I don't think he did other than I asked him how his back was.

Q. In any other conversation did he say he got the pain while lifting the derrick?

A. He just figured he was hurt at that particular time.

Q. What do you know about any later injury to his back at Pearl Harbor.

A. The only thin*k* I know about that is that they were lifting quite a few forms and there was quite a lot of oil on the floor and his foot slipped in the oil.

Q. Is that something you saw or did he tell you?

A. I knew his foot slipped.

Q. How do you know that?

A. The fellow next to him, his foot slipped and he told me. The end of the form fell.

Q. Did you talk to Mr. Laird then or afterwards? A. I talked to him that evening.

Q. What did he tell you at that time?

(Testimony of H. D. Nelson.)

A. He told me at that time he had injured his back and was stiff. I was rooming with him at the time.

Q. Did he state he had hurt himself that day?

A. Yes, he stated he had hurt himself at Pearl Harbor on that day.

The Deputy Commissioner: Mr. Laird do you wish to ask any questions?

Q. (By Mr. Laird): Do you remember the time they put me on the sick list at Pearl Harbor?

A. Yes, it was on the 20th of January. That is when you came on my payroll on sick leave.

Q. For the Pacific Naval Air Base?

A. Yes.

Mr. Laird: That is all.

The Deputy Commissioner: Mr. Bunnett any questions?

Mr. Bunnett: No, I haven't any questions.

The Deputy Commissioner: Mr. Weingand?

Mr. Weingand: Yes.

Cross-Examination

By Mr. Weingand:

Q. Mr. Nelson did you know Mr. Laird before you went to Johnston Island? A. No, sir.

Q. You came to Johnston Island when?

A. October 3d.

Q. This accident Mr. Laird said he had on Johnston Island occurred on December 2d. Do you recall that? A. Yes.

(Testimony of H. D. Nelson.)

Q. Do you know how long Mr. Laird was there?

A. He left on December 5th.

Q. Were you rooming with him on Johnston Island? A. Not at that time.

Q. How long was this derrick you were moving?

A. Well it was I guess about 10 x 15 feet, possibly weighing 1500 pounds.

Q. How many men were assigned to the task of moving it?

A. Well I think there was five, or six—they just picked up anyone that happened to come along.

Q. As a matter of fact there were ten men weren't there lifting this derrick?

A. I couldn't swear to it.

Q. How wide was this derrick—a foot?

A. About five feet in my opinion.

Q. Didn't you just tell Mr. Pillsbury that you were straddling the derrick and lifting it?

A. The derrick is not square.

Q. You describe its dimensions.

A. In my opinion the derrick comes to a point like this (indicating) with rods on it.

Q. You mean it starts with a small base gradually becoming larger? A. Yes.

Q. And its largest dimension is how large?

A. About four or five feet.

Q. How did you fellows stand?

A. We just straddled it. I cradled with my two hands and as I lifted I pulled.

Q. Where was Mr. Laird as to you?

(Testimony of H. D. Nelson.)

A. He was on the right.

Q. Were there any men between you and Mr. Laird?

A. I think there was two on my side and one on the other side.

Q. How long did it take you to move this derrick from where it was until where you put it down?

A. Just a few minutes. I couldn't swear exactly how long.

Q. What time of day did this happen Mr. Nelson?

A. About eleven o'clock, just before noon.

Q. Up to the time you lifted this derrick did you hear Mr. Laird make any outcry?

A. You mean until we left the derrick?

Q. Yes. A. No, I didn't.

Q. Where did you go after you left the derrick?

A. I went across the street to my regular job.

Q. As a carpenter? A. Yes, sir.

Q. Did you see where Mr. Laird went?

A. I saw him go to his job.

Q. And his job at that time was filing saws?

A. Yes.

Q. Did you see him again that day?

A. I saw him as I went to lunch.

Q. What was he doing?

A. He was just standing there explaining as far as I know how he was injured.

Q. You know, do you not, Mr. Nelson, Mr. Laird worked the rest of that day?

(Testimony of H. D. Nelson.)

A. As far as I understand it he saw the doctor or the nurse that noon.

Q. As a matter of fact didn't he tell you after he was through he was going to see the doctor or the nurse about his back?

A. I don't remember as to that afterwards.

Q. Did you see him any time in the afternoon on December 2d?

A. Not to speak to. I just saw him walking up the road.

Q. Going toward his place of work?

A. I just got a glimpse of him. I might say he was going toward his work.

Q. Did you come back on the same boat with Mr. Laird to the States? A. Yes.

Q. And you discussed with him his injuries while you were on the boat to the mainland?

A. I didn't discuss his injuries, no.

Q. How did you happen to come up here today Mr. Nelson?

A. I have been keeping in contact with Mr. Laird and I got in touch with a friend of his who stated he was hurt. I had an injury myself and had got out of contact with him, and the other day I received a letter stating he was undergoing an operation and I wrote back and his sister told me he had suffered quite a bit, and I wrote back.

The Deputy Commissioner: Did he ask you to come to testify for him?

The Witness: Yes.

(Testimony of H. D. Nelson.)

Q. (By Mr. Weingand): As far as you know Mr. Nelson Mr. Laird went on with the lifting of this derrick until you got it where you wanted it, that is he was there until you all quit?

A. Yes, sir.

Q. Did he ever tell you he had some trouble with his eyes? A. Yes, sir.

Q. Didn't he tell you that was why he quit on the 5th of December so he could go to the hospital for his eyes? A. Yes.

Q. When next did you see him?

A. I ran into him after I got back.

Q. I mean, Mr. Nelson, in Honolulu?

A. I met him about the 5th of January.

Q. Was that while you were working or was on the street?

A. No, we came in to the same hotel.

Q. That is the Contractors' Hotel on the Island?

A. Yes.

Q. When did you leave the Island?

A. I left on December 27th and arrived in Honolulu on the third of January.

Q. You worked but one day with Mr. Laird for the Pacific Bridge Company?

A. Yes, sir.

Q. What was that day?

A. That was on January 13th. I signed with the Pacific Bridge Company on the 10th and went to work on Monday. I don't remember exactly.

Q. Let me help you there Mr. Nelson. We have

(Testimony of H. D. Nelson.)

agreed that the second injury occurred, if it occurred at all, on January 13th. Is that the day you were there?

A. I either signed on the 10th or 11th, whichever fell on Saturday and I went to work the next Monday morning.

Q. And that is the day you were lifting?

A. We were lifting forms.

Q. Very briefly describe the size, and shape and approximate weight of the forms?

A. The forms were concrete. They were made out of 2 x 4s and 1 x 6 sheeting. In my opinion they were between 4 and 6 feet in height and ran from 16 to 20 feet long.

Q. How many men were used to lift those forms?

A. That I couldn't tell you.

Q. More than two? A. Oh yes.

Q. As many as 20?

A. I would say between 15 and 20—approximately 15 men.

The Deputy Commissioner: Were they all lifting on the same form at the same time? How many men would pull?

The Witness: I couldn't tell you exactly.

The Deputy Commissioner: How many were lifting with you on the form you were lifting on about?

A. I would say approximately 15 men.

Q. (By Mr. Weingand): One of them was Mr. Laird? A. Yes.

(Testimony of H. D. Nelson.)

Q. What was the weight?

A. I couldn't tell you. I have no idea in the world.

Q. As heavy as the derrick you and Mr. Laird were lifting? A. No, not as heavy.

Q. Give us some rough estimate. I know you didn't weigh it.—100 pounds—1000 pounds?

A. I couldn't say.

Q. Use the same thought process that you used at arriving at the steel bearing on Johnston Island.

A. I would say the forms weighed approximately 1500 pounds.

The Deputy Commissioner:

Q. And fifteen men lifting it?

A. Yes, sir.

Q. Why should that be?

A. If you get two men on the end of each form the form will bow. In my opinion the reason we didn't have so many men on the derrick was that we didn't lift it off the ground. We slided it.

Q. You didn't see Mr. Laird slip on the form?

A. No, I heard somebody holler and somebody said he slipped.

Q. Did you see him that day? A. No.

Q. You were rooming with him?

A. I roomed with him two days after that.

Q. For the one day's work you did whose name was on the check?

A. There was no check for that one day. I was paid off by the Pacific Naval Air Bases for all that

(Testimony of H. D. Nelson.)
time. While I was in Honolulu I didn't receive any money from the third of January until the 25th or 26th.

The Deputy Commissioner: I don't see Mr. Weingand that that involves the loaned servant situation. In the Given case that I had it was indicated that the men were taken to Hawaii but at some time the men were loaned to Pacific Bridge. That seems to be the gist of this letter of Mr. Schmitz'.

Mr. Weingand: No further questions Mr. Nelson. Thank you.

The Deputy Commissioner: Mr. Hogan any questions?

Mr. Hogan: I would like to ask one question if I may.

By Mr. Hogan:

Q. This called derrick you were talking about, would that be in the nature of a drag line boom or something of that sort?

A. The derrick is built with the same kind of construction as the drag line but a derrick is a solid structure.

Mr. Weingand: Draw us a picture.

(Witness draws picture.)

Q. (By Mr. Weingand:) You have big cables here holding your boom up. A. Yes.

Q. You call this a boom? A. Yes.

Q. What is a derrick?

A. A derrick is stationary. A derrick has skids

(Testimony of H. D. Nelson.)

under it the same as pile drivers. They are all different sizes.

Q. (By the Deputy Commissioner): Was this derrick assembled or lying on the ground?

A. It was lying on the ground. We wanted to back a truck up and move it to get it out of the way.

Q. Is a derrick something in the nature of a drag line boom? A. Yes.

The Deputy Commissioner: I have been handed some medical reports by Claimant:

Report of Dr. G. Mosser Taylor dated July 6, 1942. Received in evidence as Exhibit "A".

Report of Dr. Leslie C. Grant, dated July 21, 1942. Received in evidence as Exhibit "B".

A statement from Builders Pearl Harbor Dry Dock No. 4, dated February 10, 1942. Received in evidence as Exhibit "C".

Mr. Weingand: I object to the introduction of that letter for the reason it is self-serving and hearsay and makes obvious conclusions.

The Deputy Commissioner: Objection overruled without prejudice. That is, Mr. Weingand, I appreciate the force of your comment but it may be admissible for some other limited purposes.

Claimant has also handed me a copy of claim for compensation he filed with Deputy Commissioner Schmitz on February 5th, 1942.

Copy of statement over the signature of Deputy Commissioner Schmitz of which I have copies in

(Testimony of H. D. Nelson.)
my office. It will be understood these copies will be in the file.

Hearing continued to two weeks from today.

Reporter's Certificate

I Hereby Certify that the foregoing is a true and correct transcript of the testimony *of the testimony* and proceedings at the hearing held at State Industrial Accident Commission Hearing Room, State Building, Los Angeles, California, on August 4, 1942.

/s/ SARA T. LONGLEY,
Reporter.

EXHIBIT A

G. Mosser Taylor, M.D.
Alonzo J. Neufeld, M.D.

Orthopedic Surgery

1216 Wilshire Blvd., Los Angeles

Name Laird, Mr. Fred F.
Address 608 E. 67th St., Inglewood.
Phone OR 1-8023
Referred by Leslie C. Grant, M.D.
Relative Lavern Laird—wife same add.
Date July 6, 1942
Age 31 Cauc Male Married Aircraft Worker
Present Employer: Northrup Aircraft, Hawthorne, California

Exhibit A—Continued)

Insurance Carrier: Prudential.

Employer at time of Injury: Hawaiian Dredging Company

Insurance Carrier: Liberty Mutual Insurance Company

Chief Complaint

Painful right low back and leg.

History of Chief Complaint

Onset——Sudden, about six months ago, when lifting a heavy piece of iron experienced a burning pain in the low back running down into the right gluteal region.

Course——Heat was given. Improved some with rest but never has been completely well. Was returned to the mainland, having been working in the Territory of Hawaii. Before returning to the mainland was attempting to do some work at Pearl Harbor, while lifting a form pain again appeared, this time running down toward the knee, also affecting the right groin. From March 29, 1942 to June 4, worked for Northrup Aircraft Company. No particular occasion occurred that would aggravate it except the gradual increase of his symptoms.

Present Status

Pain is more or less constant, throbbing in character.

Worse at night. Keeps him awake hours at a time. Stiffness on getting out of bed in the morning. Keeps changing position while seated, or

Exhibit A—Continued)

standing. Walking over a block or two is practically impossible.

Pain is being referred down the leg with numbness and tingling affecting it.

Coughing aggravates markedly, also refers the pain.

No differences so far as barometric changes are concerned.

Past History

Irrelevant. No previous serious accident affecting the back or right leg.

Examination

Examination reveals a well developed, well nourished young adult white male. Temperature 99.6°, pulse 100, height 5′8″, weight 140 pounds. Rather apprehensive.

Gait——Walks with a marked limp on the right, with the body flexed somewhat to the left and forward.

Standing——Stands with weight on the left.

Posture——Typical sciatic scoliosis. Marked lumbar muscle spasm. Levels are normal.

Movements——Forward bending 30° with list slightly toward the left. Backward bending uncomfortable. Right and lateral bending done slowly. All other movements free.

Deep Percussion over the lower back painful.

Lying Supine

Mensuration——Leg lengths: Right 86.5 cm., Left 86.5 cm.; Thighs: Right 35 cm., Left 36 cm.; Calves: Right 35.5 cm., Left 34 cm.

Exhibit A—Continued)

Movements——Straight leg raising: Right 35°, left 80°, both to 60° from the horizontal. Flexion of the knees on abdomen painful at limits.

Lying on Sides——Torsion with right side up painful.

Lying Prone——Hyperextension with both painful.

Tenderness——Lower lumbar interspinous ligaments, but mainly sacrolumbar.

A small mass is present in the midline at about the level of the 5th lumbar spine, or between the 5th lumbar and the 4th. Quite tender to palpation.

Right costolumbar and iliolumbar angles tender.

Gluteal region quite tender on the right.

Pressure of the right lumbar lateral margin produces pain down the right leg.

General Findings

Tonsils enlarged, cryptic, full of caseous and purulent material. Pillars are reddened.

Reflexes——Reflexes: Achilles on the right lost.

Sensory Modalities——Hypesthesia of the lower outer surface of the right leg from the middle of the leg to a point just below the malleolus.

X-ray Examination

Made by Leslie C. Grant, M.D., July 3, 1942, showing antero-posterior and lateral views of the lumbar spine and pelvis, reveals good bone detail, fairly normal joint outline. The space between the 3rd and 4th appears a little less than that

Exhibit A—Continued)

below it or even that above it. The sacrolumbar disc is also thinned, particularly posteriorly where there is a certain amount of exaggeration of the posterior angle of the 5th lumbar vertebra.

Diagnosis

Ruptured nucleus pulposus involving the 5th lumbar. Focus of infection: Chronic follicular tonsillitis.

Discussion

Lesions of the intervertebral disc are generally due to an accident, such as lifting. The immediate relationship between the act of lifting is of course six months previous to which he had had no trouble in his back, and the establishment of the symptoms which have persisted until the present identify the accident with his complaint to a reasonable degree of certainty.

Under local anesthetic a rupture of the nucleus was found between the 4th and 5th lumbar which was quite prominent and was producing considerable tension on the nerve root as it passed over. After retracting this nerve root and the dura the nucleus was removed and all the debris within the disc itself was removed by special forceps and curetted. Because of increased mobility between these vertebrae, a fusion was done, placing a block of bone taken from the posterior spine of the ilium and placed between the spine of the 4th and 5th lumbar vertebrae. The doctors in attendance

Exhibit A—Continued)

were Alonzo J. Neufeld, my associate, and Leslie C. Grant, the referring physician.

/s/ G. MOSSER TAYLOR, M.D.
ALONZO J. NEUFELD, M.D.

EXHIBIT B

Leslie C. Grant, M.D.
3130 W. Manchester Blvd.
Inglewood, Calif.

July 31, 1942

To Whom it May Concern:

Mr. Fred Laird of 608 E. 67th Street, Inglewood, Calif., first consulted me about a pain in the back on June 4, 1942. At this first consultation he complained of pain which radiated down his right leg, a pain which was much aggravated by coughing or straining. He had some burning on urination and a temperature of 102°. On examination: Straight leg raising right leg 30°, left leg 80°. Reflexes; Achilles and knee jerk—markedly reduced on right, normal on left. Slight hyperesthesia along lateral aspect of right leg. Rectal exam shows a tender boggy prostate with marked tenderness on right lobes. Prostatic secretion shows pus cells. Stained smears show no gram negative intracellular diplococci. On the basis of these finding a diagnosis of acute prostatitis together with a possible ruptured nucleus pulposus was made. Biweekly prostatic massage together with diathermy through the pelvic region was

Exhibit B—Continued)

began and the prostatic condition after an initial flareup requiring two days of hospitalization began to improve. The prostatic secretion became normal but the back pain continued unabated, so he was referred down to Dr. G. Mosser Taylor for consultation and confirmation of the tentative diagnosis of ruptured nucleus and pulposus. On his advice surgery was performed on July, 9, 1942 at which time the bulging disc with the stretched nerve root coursing across it were clearly demonstrated.

The postoperative course has been very satisfactory with a complete absence of the former pain down the right leg. He was given a lumbo-sacral brace on July, 28, 1942 and is now up and about.

An itemized statement of Mr. Lairds account with us is given on the attached sheet.

The prognosis for ultimate cure is good, probable permanent disability because of the necessary fusion of the 5th Lumbar vertebrae may approximate 25%.

/s/ LESLIE C. GRANT M.D.

Exhibit B—Continued)

Form US-203

United States Employees' Compensation Commission

Office of Deputy Commissioner Pacific District Administering Longshoremen's and Harbor Workers' Compensation Act

Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

Injured Person

1. Name of employee Fred F. Laird. Employee's check No. 943 (Pac. Bridge).

2. Address: Street and No. Contractors Hotel. City or town Honolulu-27463 (PNAB).

3. Sex Male. Age 31. Married, single, widowed Married.

4. Do you speak English? Yes. Nationality American.

5. State regular occupation Carpenter-foreman.

6. What were you doing when injured? Carpentering.

7. (a) Wages or average earnings per hr., $1.50. (Include overtime, board, rent, and other allowances.) (b) Per week, $........ (c) Were you employed elsewhere during week in which you were injured? .... (d) If so, state where and when ....

Exhibit B—Continued)

8. Were you paid full wages for day of accident? Yes.

Employer

9. Employer Pacific Bridge or Contractors, PNAB.

10. Office address: Street and No. .... City or town Honolulu.

11. Nature of business Construction.

The Injury

12. Place where injury occurred Dry Dock #4.

13. Name of foreman Fred Toft, Sup't.

14. Date of accident or first illness, the 13th day of January, 1942, at 9 o'clock a.m.

15. How did accident happen or how was occupational disease caused? Lifting cement form.

Nature and Extent of Injury

16. State fully nature of injury or occupational disease: Pain in right side and torn ligaments. Possible hernia.

17. On what date did you stop work because of injury? January 28, 1942.

18. Have you returned to work? (Yes or No.) No. If "yes," on what date?........, 19....

19. Does injury keep you from work? (Yes or No.) Yes.

Exhibit B—Continued)

20. Have you done any work in period of disability? Yes.

21. Have you received any wages since injury? Yes. If so, from and to what date? Up to January 28.

22. Has injury resulted in amputation? No. If so, describe same ....

23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes.

24. Attending physician: Name Alsup Clinic. Address Honolulu.

25. Hospital: Name........ Address ....

Notice

26. Have you given your employer notice of injury? (Yes or No.) Yes. When? January 13, 1942.

27. If such notice was given, to whom? Timekeeper.

28. Was it given orally or in writing? Orally.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

/s/ FRED F. LAIRD,
Claimant.

Exhibit B—Continued)

Mail address Contractors Hotel, Honolulu, Mainland Address, P.O. 875, Inglewood, Calif. c/o Walter Frey.

Dated February 5, 1942.

EXHIBIT C

Builders Pearl Harbor Dry Dock No. 4

Contract Noy 5049

Pacific Bridge Company
P.O. Box 3650

Cable Address: Dockfour Honolulu, T.H.
February 10, 1942

To Whom It May Concern:

This is to certify that Fred Laird has been working for this Company since December 14, in the capacity as carpenter foreman.

We have found Mr. Laird's work and ability to handle men satisfactory in every respect, and, therefore, do not hesitate to recommend him to anyone in need of a man of this classification.

The reason Mr. Laird left our employ was because of an injury which he sustained previous to our employing him.

BUILDERS PEARL HARBOR
DRY DOCK NO. 4

/s/ H. MAXWELL,
Personnel Manager.

HOM:wc

REPORT OF DEPUTY COMMISSIONER ON COMPENSATION

Stipulations

Report of informal conference held in the office of the Deputy Commissioner, Pacific Compensation District, Saturday, February 14, 1942, at 12:00 noon.

Present

Mrs. Gluckman, insurance clerk, Contractors, PNAB; C. F. White, resident manager, Liberty Mutual Insurance Company, representing the employer, Contratcors, PNAB; George X McLanahan, representing Builders, Pearl Harbor Dry Dock #4 and its predecessor, Pacific Bridge Company; and A. H. Matthew, representing U.S. Fidelity and Guaranty Company, insurance carrier for Builders, Pearl Harbor Dry Dock #4.

Presiding

A. F. Schmitz, Deputy Commissioner, Pacific Compensation District..

Mr. McLanahan was requested to enlighten the deputy commissioner as to why reports had not been filed. Mr. McLanahan explained that Fred Laird originally was employed by Contractors, PNAB; that on January 13, 1942, the date of the injury, he was, however, actually at work for the Pacific Bridge Company, under its jurisdiction and supervision, and was on its payroll; that the wages earned were, however, paid to him through the Contractors, PNAB; that the failure in filing is probably due to a mistake caused by the loaned labor arrangement.

Mr. McLanahan insists that he promptly reported the injury to Contractors, PNAB, because in his opinion they would take care of the compensation iiability. Apparently they did not do so and did not again contact him in this regard.

Mr. A. H. Matthew, representing the employer, Builders, Pearl Harbor Dry Dock #4, and insurance carrier, U.S. Fidelity and Guaranty Company, stated that he has gone into this matter thoroughly and is satisfied that the relationship of employer and employee existed between Fred Laird and Builders, Pearl Harbor Dry Dock #4, or its predecessor, on January 13, 1942, and that the employer and employee were within the scope of the Defense Bases Act at that time, and hereby stipulates to such fact.

Mr. Matthew submitted a report of Dr. F. J. Alsup, dated February 2, 1942, which indicates that there is doubt as to whether or not the claimant's present condition is the result of injury by accident occuring on January 13 as alleged.

It is learned that Fred Laird has left Honolulu and is on his way to the mainland and that further action in this case will necessarily be held in abeyance until Mr. Laird requests disposition of his claim.

The matter of Leonard David Nelson was then discussed. Mr. Matthew stated that he will stipulate in the matter of Mr. Nelson also that Mr. Nelson was in the employ of Builders, Pearl Harbor Dry Dock #4 on January 10, and that the employer

and employee are within the scope of the Defense Bases Act.

Mr. Matthew presented statements by W. J. Futrell, co-worker of Mr. Nelson, dated February 13, 1942, Delbert Phillips, foreman, dated February 13 and George X. McLanahan, dated February 13, indicating that Nelson failed to report his accident as required by the law.

It was impossible to get in touch with Mr. Nelson at this time and it is thought that he, too, has already returned to the mainland. In view of this, no further action will be taken in this claim unless and until requested by Mr. Nelson.

Yours truly,

/s/ ANDREW F. SCHMITZ,
Deputy Commissioner,
Pacific District.

AFS:jm

Stipulated to by U.S. Fidelity and Guaranty Company.

By /s/ A. H. MATTHEW.

Copy forwarded to Washington.

Filed Aug. 21, 1942.

United States Employees' Compensation
Commission

Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Case No. 8 Claim No. 13

FRED F. LAIRD,

Claimant,

vs.

PACIFIC BRIDGE COMPANY, HAWAIIAN DREDGING CO.,

Employers,

U.S. FIDELITY & GUARANTY CO., LIBERTY MUTUAL INSURANCE CO.,

Insurance Carriers.

TRANSCRIPT OF TESTIMONY AT HEARING

August 18, 1942

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at Hearing Room of Industrial Accident Commission, State Biulding, Los Angeles, California, on the 18th of August, 1942, at 9:15 a.m.

Appearances

Claimant present in person and represented by MR. P. S. BLEK, Attorney at Law, Inglewood, California.

Defendants Pacific Bridge Co. & U.S. Fidelity & Guaranty Co. represtend by MR. F. W. BONNETT, Attorney at Law, Los Angeles, Cal.

Defendants Hawaiian Dredging Co. and Liberty Mutual Ins. Co. represented by MR. CLAUDE F. WEINGAND, Attorney at Law.

Deputy Commissioner Pillsbury:

An emergency hearing was held on stipulation on August 4, 1942, to take the testimony of a witness at which time I did not have my file as it had not been set for hearing on that day. The matter now comes on for hearing regularly upon the claims on file. It is understood that the two injuries covered in the two claims referred to above will interlock and for that reason I am proceeding on a consolidated transcript on the two claims.

The two claims are for a back injury on December 2d, 1941 while in the employ of Hawaiian Dredging Co., and a back injury on January 13, 1942 while in the employ of Pacific Bridge Company and this hearing is for the purpose of disentangling, if possible the disabilities with reference to the two injuries.

These cases arise under the Military Bases Act, an Act of Congress of August 16, 1941 extending the provisions of the Longshoremen's and Harbor Workers' Act to employment on Air, Military and Naval Bases of the United States. The two injuries, above mentioned, are conceded to have occurred at Johnston Island and Pearl Harbor respectively.

The cases have been transferred to me by the Deputy Commissioner at Honolulu with approval of the U.S. Employees' Compensation Commission for hearing and decision. Since claimant's arrival in California an operation has been performed on his spine but not by the Insurance Carrier's physicians.

The Deputy Commissioner (To Mr. Blek): Mr. Blek what are Claimant's contentions?

Mr. Blek: That he was injured in the course of his employment and it is a proper case for compensation. I notice the Carriers deny he was injured in the course of his employment or that he was injured at all.

The Deputy Commissioner: Have you anything definite as to which of the two injuries should be charged to either Carrier?

Mr. Blek: I think it was the first one and the second aggravated the condition.

The Deputy Commissioner: Then the claim of injury is against both of them?

Mr. Blek: Both of them, yes.

The Deputy Commissioner: Mr. Bonnett, what is your contention?

Mr. Bonnett: It is our contention he was not in the employ of Pacific Bridge Company at any time and the cause was from the first accident. That there is no relation between the Claimant and the Pacific Bridge Company.

The Deputy Commissioner: Mr. Weingand what are your contentions?

Mr. Weingand: Our contention is that if the em-

ploye did sustain an injury while in the employ of the P N A B it was not an injury that caused any disability. Second, that in the second injury the Claimant was in the employ of Builders, Pearl Harbor Dry Dock No. 4, and in that connection I refer to stipulations which were transcribed of the informal conference on February 14th. The stipulations were evidently taken at Honolulu, in which Deputy Commissioner Schmitz states he has gone into this matter further and he is satisfied that the relation of employe and employer existed between Fred Laird and Builders, Pearl Harbor Dry Dock No. 4, or its predecessor—Pacific Bridge Company.

Stipulation

The following facts are agreed to by Claimant and Pacific Bridge Company and U.S. Fidelity & Guaranty Company:

(1) That on and about January 13, 1942 defendant Pacific Bridge Company was insured against liability under the U.S. Longshoremen's and Harbor Workers' Act as extended by said Act of Congress of August 16, 1941 by U.S. Fidelity and Guaranty Company.

(2) That the claim is within the provisions of said Acts and the jurisdiction of the Deputy Commissioner.

(3) No claim is made of intoxication or wilfully self-inflicted injury.

(4) No medical treatment has been furnished by these defendants. That if I find the defendants to be liable to claimant for compensation for the alleged injury my compensation order may carry with it a direction to reimburse claimant for his reasonable medical expenses proportionately or otherwise as the compensation may be proportioned.

(5) Notice of claim of injury within proper time is admitted.

(6) No compensation has been paid.

Issues

The issues are:

(1) Whether claimant was in the employ of Pacific Bridge Company at the time of his alleged injury of January 13, 1942.

(2) Whether claimant was injured while in said employ.

(3) Whether such injury occurred in the course of and arose out of his employment.

(4) Average earnings in employment.

(5) Nature and extent of disability due to said injury.

As between claimant and defendants Hawaiian Dredging Company, Contractors Pacific Naval Air Bases, and Liberty Mutual Insurance Company, the following facts are agreed to:

(1) Claimant Fred F. Laird was in the employ of defendant Hawaiian Dredging Company, a member of the Association known as Contractors Pacific Naval Air Bases, on and about December 2, 1941, and at said time said employers were insured against liability under the Longshoremen's and Harbor Workers' Act as extended by said Military Bases Act, by defendant Mutual Insurance Company. That as between these two defendants, Pacific Bridge Company and Contractors Pacific Naval Air Bases may be substituted for the Hawaiian Dredging Company for the purpose of this proceeding.

(2) That the claim is within the provisions of said Acts and the jurisdiction of the Deputy Commissioners.

(3) No claim is made of intoxication or wilfully self-inflicted injury.

(4) No medical treatment has been furnished by these defendants.

(5) Claimant's average earnings may be fixed for the purpose of this proceeding at $300.00 a month.

(6) No compensation has been paid.

Issues

The issues are:

(1) Whether claimant was injured in the employ of these defendants as alleged.

(2) Whether such injury occurred in the course of and arose out of his employment.

(3) Whether claim for compensation is barred by

(4) Whether any claim for disability since December 2, 1942 is chargeable to this injury.

(5) It Is Further Stipulated that if I find claimant entitled to compensation for this injury award may be made in his favor for his reasonable medical expenses, apportioned or not as the outcome of the case may be determined.

FRED F. LAIRD

the Claimant herein, being first duly sworn by the Deputy Commissioner, testified as follows:

Direct Examination

By the Deputy Commissioner:

Q. Your name is Fred F. Laird?

A. Yes, sir.

Q. What is your address now Mr. Laird?

A. 608 East 67th Street, Inglewood, California.

Q. You are the claimant in these cases?

A. Yes, sir.

Q. And according to your claim you were working on Johnston Island for Pacific Naval Air Bases or Hawaiian Dredging Company, one of its members, on December 2, 1941? A. Yes, sir.

Q. What kind of work were you doing?

A. I was originally engaged as a saw filer. Signed

(Testimony of Fred F. Laird.)

up as a carpenter and he turned me over and put me to filing saws.

Q. On December 2, 1941 which work were you doing? A. I was filing saws.

Q. Did you meet with any accident on that day?

A. That day I moved this stiff legged derrick so the truck could come in. We picked it up about six inches. The front end went down first and I was on the back end and this sharp pain hit me on the back (pointing to fifth lumbar).

Q. Did you receive medical treatment?

A. Yes, sir.

Q. Who did you go to?

A. The male nurse.

Q. What did he do for you?

A. He looked at it and said, "I don't know what is wrong and if it doesn't get better I will have a Marine Doctor from Sand Island." The next day the Marine Doctor told me I have a sacroiliac slip.

Q. Did you do any work the next day?

A. My foreman told me he didn't require me to do anything and I just hung around.

Q. Did you do any more work after December 2d? A. No, sir.

Q. When did you leave for Honolulu?

A. December 5th. I left there December 10th. Mr. Nichols said, "I am going to loan you to Pacific Bridge." I said, "When? I am still sore." He said, "Go on out. I haven't time to fool with you."

Q. When was that?

(Testimony of Fred F. Laird.)

A. That was December 13th.

Q. Were there still emergency conditions there as a result of the bombing?

A. Yes, that was the reason they were sending me.

Q. Was there any reasons on your papers for sending you to Honolulu?

A. I don't know what the papers read. All I know he told me before I left that I needed glasses and he had left word with Jeff if my eyes continued to get bad to send me in for glasses also and he said I could go on for glasses while my back was sore without losing too much time.

Q. Did you report to any doctor in Honolulu for your back before January 13th?

A. Yes, Dr. Alsup.

Q. Who sent you?

A. The Pacific Bridge Company.

Q. Did you report to any doctor in Honolulu for your back before January 13th? A. No.

Q. Then as I understand it on your arrival at Honolulu you were told to go out and work for the Pacific Bridge Company? A. Yes.

Q. Where did you report?

A. I reported to a man by the name of Carlson at Dry Dock No. 4.

Q. What did he do?

A. He immediately put me to work as a pusher.

Q. Did you make any contract of employment?

A. No, I didn't.

(Testimony of Fred F. Laird.)

Q. Who did you get your money from?

A. The Pacific Bridge, through the Contractors.

Q. Was it a check on the Pacific Bridge?

A. Yes.

Q. What was this about your getting it through the Contractors PNAB?

A. I said, "How come I am getting it from the Pacific Bridge" and the Pacific Bridge man told me I was only loaned to them.

Q. Your testimony is that after you went to work at the Dry Dock you got your pay checks by pay checks of the Pacific Bridge Company. Is that right? A. Yes, sir.

(By Mr. Blek): From his statement of earnings and payroll deductions, one being for the weekly period ending January 7, 1942, No. 58 Builders Pearl Harbor Dry Dock No. 4, Contract No. N.O.Y. 5049, employe Co. No. 943, paid to the order of Fred F. Laird $125.75. Certain deductions are then mentioned. The slip concludes with the words, "Not negotiable. This statement is to be retained by employe detached from check before cashing." Printed signature, "Builders, Pearl Harbor, Dry Dock No. 4." On the prepay part appears this statement: "Pacific Bridge Company, a Delaware corporation, Builders Pearl Harbor, Dry Dock No. 4."

The Deputy Commissioner (To Mr. Bonnett): Mr. Bonnett, can you stipulate Pacific Bridge Company and Builders, Pearl Harbor, Dry Dock No.

(Testimony of Fred F. Laird.)

4 are the same entity, that is, that Pacific Bridge Company was doing work at the Dry Dock under Pearl Harbor, Dry Dock No. 4?

Mr. Bonnett: Yes, all stipulated.

By the Deputy Commissioner (To Mr. Laird):

Q. At the time you went to work for the Pacific Bridge Company was anything said about any change in your classification?

A. Maxwell asked me to change. He was the Personnel Manager. I told him no.

Q. Maxwell was the Personnel Manager for PNAB? A. No, Pacific Bridge.

Q. Was there any change in your wages?

A. They raised me from $1.20 to $1.30 and from $1.30 to $1.50 an hour.

Q. What did you do? A. As a foreman.

Q. What did you average a week on that job?

A. I averaged $100.00 a week, due to the fact I was not able to work on account of my back all the time.

Q. Did you have any conversation with the Pacific Bridge Company about your back prior to January 13th?

A. Yes, with the Personnel Manager, Maxwell. I told him I had injured my back and wasn't able to do heavy lifting and I think that is why they made me a foreman.

Q. Did anything happen to you on January 13th?

A. Yes, sir.

Q. What happened?

(Testimony of Fred F. Laird.)

A. We had men working on forms. They were approximately 18 feet long, 7 x 11 wide and 2 x 6s. We turned them over to cross them and I started to help the boys turn them over.

Q. What happened to your back?

A. I lifted the form up and my foot slipped on the grease and the pain hit me in the back of the leg.

Q. Did your leg get any worse at that time?

A. Yes, considerably worse.

Q. How heavy lifting were you doing at the time of this second injury?

A. I couldn't say how heavy but I lifted too much.

Q. What did you say you were lifting?

A. This form.

Q. About what would you say the form weighed?

A. 1,000 pounds or more.

Q. How many do you think were lifting on the form the same time as you were?

A. I should judge between seven and twelve.

Q. What did you do then about medical treatment?

A. I reported to my timekeeper and he gave me a slip to the nurse.

Q. You were treated were you?

A. He just looked at me and I went back and it started to hurt again and the timekeeper sent me to him again and he said "I guess you have a hernia" and he recommended I be sent to the main-

(Testimony of Fred F. Laird.)

land, and they, the Contractors, sent me home through PNAB.

Q. And the wages were paid by Contractors?

A. Yes, sir.

Q. What was the wages?

A. The last wages I received from PNAB was December 5 on Johnston Island.

Q. And the Pacific Bridge Company work ceased when? A. January 28th.

Q. But you were given transportation by PNAB? A. Yes, sir.

Q. When did you return to California?

A. I think between February 8th and 9th.

Q. What have you done since you have come to California?

A. I first went to Dr. Burrows of Inglewood. He looked at me and said, "Without further examination I can't tell you what is wrong." I went back to him the second time and I had to get my family and on the way back my little boy was taken with a ruptured appendix and I was so taken up with him I forgot myself, and due to the operation on the boy I had to get some more work.

Q. Have you done any work since you came back to California?

A. I tried it. I worked from March 30th to and including June 15th I believe.

Q. What kind of work did you do?

A. I was in the assembly line at Northrup as a finisher.

(Testimony of Fred F. Laird.)

Q. How much did you get?

A. I think it was $36.00.

Q. Were you able to do your regular work as a carpenter?

A. No, I was just able to use a little screw driver.

Q. What did you do on June 15th?

A. My back was getting worse all the time and I had to misrepresent to the Company in order to hold my job. I told them I had a cold. I was on and off and then gave it up.

Q. Then what did you do?

A. I went to Dr. Leslie Grant.

Q. What did he do?

A. He examined me and said, "There is something seriously wrong I am sure." He found a bad prostrate gland but didn't find the cause of it. He then referred me to Dr. G. Mosser Taylor, and he immediately found there was a rupture and operated immediately and a sciatic nerve was pulled out of my spine.

Q. Where were you operated on?

A. Centinela Hospital, Inglewood.

Q. When?

A. That was July 9th I believe.

Q. Are you getting along all right now from the operation?

A. Yes, my back is awful weak and I have a dull ache.

Q. Have you gone back to work? A. No.

Q. Did you take the matter up with either In-

(Testimony of Fred F. Laird.)

surance Company after you returned to California?

A. Yes, immediately after Dr. Taylor told me what was wrong I called both Insurance Companies.

Q. They didn't offer an operation?

A. No, sir.

Q. Now about the mention of hernia, have you had any hernia since last December?

A. No. I have a weakness there.

Q. You have no hernia at this time?

A. No.

Q. Is there anything else you wish to state about your case? A. No, sir.

The Deputy Commissioner: Mr. Bonnett any questions?

Mr. Bonnett: Yes.

Cross-Examination

By Mr. Bonnett:

Q. Was that a written contract you had?

A. Yes, sir.

Q. That was executed before you left here?

A. Yes, sir.

Q. You have a copy of the contract?

A. Yes, sir, at home.

Q. (By the Deputy Commissioner): That is one of the usual printed forms?

The Witness: Yes, sir.

Q. (By Mr. Bonnett): When you left Johnston Island you called on this Mr. Maxwell?

A. Mr. Nichols, Personnel Manager.

(Testimony of Fred F. Laird.)

Q. Did he send you to Mr. Maxwell?

A. Yes, sir.

Q. Then Mr. Maxwell put you to work on the Island?

A. No, he sent me to a fellow by the name of Carlson and Mr. Carlson referred me to the Pacific Bridge manager and they put me to work at Pacific Bridge.

Q. The doctor examined you did he?

A. He just looked at me. He took down the front of my clothes and said, "This is injured and that is why you have the pain." He wouldn't even look at my back due to the confusion, I suppose of the raid.

Q. This slipping in the oil, did your feet go out from you?

A. No. This right foot was in the puddle of grease which I didn't notice, and as I started to slip this right foot spread out.

Q. When you came back to the mainland did they give you a ticket?

A. No, they called us by numbers.

Q. What kind of ship?

A. I came on a transport. I was told I would receive my money from Honolulu but never received one dime.

Cross-Examination

By Mr. Weingand:

Q. Mr. Laird, going back to Johnston Island, that injury occurred in the morning did it?

(Testimony of Fred F. Laird.)

A. Yes.

Q. Did you go back to work that day?

A. I merely sat around, that is all.

Q. It was that night you first went to the male nurse Jeff?

A. No, I reported to him immediately after lunch and he was not there and I sat around the shop and Mr. Decker told me to go back to him at three o'clock.

Q. You didn't work on that day?

A. No, I didn't do any work.

Q. Were you there?

A. I reported to my foreman and gave him the slip Jeff had given me, and went back to my tent.

Q. When did you leave for Honolulu?

A. December 5th.

Q. Mr. Laird in order to get passage to Honolulu did you have to have any slip of paper signed by anyone? A. Only that male nurse Jeff.

Q. Is that the one that has since committed suicide? A. Yes.

Q. Do you recall what the slip said in substance Mr. Laird? A. No, I don't.

Q. Did it say in substance you were to go to Honolulu to have your eyes examined and glasses fitted?

A. There was a slip given to me. He told the man he recommended I be sent to Honolulu.

Q. You don't remember the name of the man Jeff said this to? A. No, I don't.

(Testimony of Fred F. Laird.)

Q. When did you go to Honolulu?

A. December 10th about 11:00 o'clock.

Q. Did you have your eyes examined?

A. Yes.

Q. And did you get glasses? A. Yes.

Q. Then on the 13th you went to Mr. Nichols of the Contractors PNAB and told him you were ready to go back to Johnston Island?

A. I didn't know I was injured as bad as I was and I told him I was ready to go back to Johnston Island and he said they were going to loan me to Pacific Bridge.

Q. What was the condition of your back between the time you left Johnston Island and arrived in Honolulu?

A. There was a deep pain in my back and in my hip.

Q. On the 13th of December you reported to work at this Dry Dock? A. Yes, sir.

Q. And you worked steadily from December 13th to January 13th?

A. No, not steadily. I was off every time I could get off and let my back rest.

Q. You said during that time from December 13th to January 13th you earned $400.00?

A. Approximately.

Q. On January 13th Mr. Laird, was there any different kinds of pain experienced after your accident of that date?

(Testimony of Fred F. Laird.)

A. No, my right abdomen felt as if the pain was away deep in there and down my leg.

Q. And it was after January 13th you first felt the pain on the right side? A. Yes, sir.

Q. And it was after January 13th that you felt the pain radiate down your right leg?

A. That is right.

Q. Do you know Commissioner Schmitz?

A. Yes.

Q. Can you give us the date of your first conference with him?

A. It was after January 28th.

Q. When did you leave Honolulu for the mainland?

A. I think about the first of February.

Q. What was the purpose of your visit to Deputy Commissioner Schmitz?

A. When Dr. Alsup told me he recommended an operation I didn't think he knew what he was talking about and he told me he would recommend I be returned to the mainland and he told me to report to the Liberty Mutual Insurance Company and they told me I belonged to the U.S.F.G., and the U.S.F.G. told me I belonged to the Liberty Mutual.

Q. During any of your conversations with Deputy Commissioner Schmitz did you mention the fact that you had an accident while on Johnston Island? A. Yes, I did.

The Deputy Commissioner: Mr. Schmitz did not

(Testimony of Fred F. Laird.)

send me his file but I have here a document marked "Stipulations" of February 14, 1942, signed by Deputy Commissioner Schmitz. I will offer this at this time for introduction in evidence.

Mr. Weingand: No objection.

Mr. Bonnett: No objection.

The Deputy Commissioner: Received in evidence as Exhibit A. This refers to accident of January 13th. I can wire Deputy Commissioner Schmitz to ask if this earlier accident was mentioned to him.

Mr. Weingand: The reason I asked these questions, I have a wire from our representative in Honolulu in which he states Deputy Commissioner Schmitz stated there was never any mention made of his accident of December 2d.

The Deputy Commissioner: I wish to avoid delay and will wire Deputy Commissioner Schmitz to inquire if he made any mention of an earlier accident to Deputy Commissioner Schmitz.

Mr. Laird: There was never any note made. It was just informal.

Mr. Weingand (To Mr. Laird):

Q. Did you file a claim there?

A. Yes, I did and I told him I couldn't get any action on Johnston Island.

Q. When did you arrive in Honolulu?

A. December 10th.

Q. From December 10th until the date of your

(Testimony of Fred F. Laird.)
second alleged injury on January 13th did you go to any doctor?

A. No, I first acted on what the doctor told me on Johnston Island.

Q. Since July 8th has your condition improved or gotten worse?

A. It has improved. The pain in my leg has gone.

Q. And now your principal complaint I believe is weakness? A. Yes.

Mr. Weingand: That is all Mr. Pillsbury. I would like to have the claimant examined by a doctor of our own selection.

The Deputy Commissioner: Very well.

LARRY DECKER

a witness produced on behalf of Claimant, being first duly sworn by the Deputy Commissioner, testified as follows:

Direct Examination

By the Deputy Commissioner:

Q. What is your full name?

A. Larry Decker.

Q. Your address Mr. Decker?

A. 211 E. 55th Street, Los Angeles.

Q. Do you know Mr. Laird here?

A. Yes, sir.

Q. Were you working with him on Johnston Island or Pearl Harbor?

(Testimony of Larry Decker.)

A. I was a metal foreman and he worked under me at Johnston.

Q. Do you know of the accident of December 2d?

A. Yes, I asked the boss to shove the derrick ahead so we could put the truck in. One of the boys slipped and he got the weight of it. He came in and sat down and I said "Did it get you?" and he said "Yes, I have got a pain in my back" and I told him to see Jeff. He went down and he wasn't there and he came back and sat down and after awhile I said, "You better go back again to see him."

Q. Do you know why Mr. Laird was returned to Honolulu?

A. They had intended to send him to get glasses but didn't intend to send him then.

Q. Did you have any conversation with this nurse?

A. Yes. He said "I don't think I can do anything but put a light on it." He wasn't a doctor.

Q. Was Mr. Laird able to do anything after this accident?

A. Oh, no, he stayed in his tent. He got a slip from the assistant paymaster that he was not able to work. I had to send that in with the payroll.

Q. Did you send that in with the payroll?

A. Yes.

The Deputy Commissioner: Mr. Blek, any questions?

(Testimony of Larry Decker.)

Mr. Blek: No questions.

The Deputy Commissioner: Mr. Bonnett, any further questions?

Mr. Bonnett: No.

The Deputy Commissioner (to Witness): Did you work with him at Pearl Harbor?

The Witness: No.

Mr. Weingand: Did you see him slip?

The Witness: I saw a fellow slip and he must have caught the weight of it.

Mr. Weingand: Mr. Pillsbury, may we have five days after filing of reports?

The Deputy Commissioner: Yes.

Mr. Weingand (to the Deputy Commissioner): When you wire Mr. Schmitz will you try to get a report of Dr. Alsup?

The Deputy Commissioner: Yes. File to be submitted for decision upon filing of the further report mentioned by Mr. Weingand if no request is received from Mr. Weingand after receipt of report and receipt of wire from Deputy Commissioner Schmitz in answer to wire I will send him.

Attorney's fee requested by Claimant's Attorney, Mr. Blek.

REPORTER'S CERTIFICATE

I Hereby Certify that the foregoing is a true and correct transcript of the testimony and proceedings at the hearing held at Hearing Room of State Industrial Accident Commission, Los Angeles, California, on the 18th day of August, 1942.

/s/ SARA T. LONGLEY,
Reporter.

Filed Sept. 10, 1942.

Copy forwarded to Washington.

Received Sept. 9, 1942, District No. 13.

United States Employees' Compensation Commission, Before Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District

Case No. BA-8, Claim No. DB-13

FRED F. LAIRD,

Claimant,

vs.

CONTRACTORS, P N A B and BUILDERS PEARL HARBOR DRY DOCK No. 4,

Employers,

LIBERTY MUTUAL INSURANCE CO., U. S. FIDELITY & GUARANTY CO.,

Insurance Carriers.

TRANSCRIPT OF TESTIMONY AT HEARING

Sept. 15, 1942

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at Hearing Room Industrial Accident Commission, Los Angeles, California, on the 15th day of September, 1942, at 2:30 p.m.

Appearances

Claimant present in person and represented by Mr. C. L. Bleck, Atty. at Law, Inglewood, California.

Defendants Contractors PNAB & U. S. Fidelity and Guaranty Co., represented by Mr. F. W. Bunnett, Atty., Los Angeles, California.

Defts. Builders Pearl Harbor & Liberty Mutual Ins. Co., represented by Mr. Claude F. Weingand, Atty., 939 Rowan Bldg., Los Angeles, California.

Deputy Commissioner Pillsbury:

Mr. Weingand requests a continuance for approximately two weeks to my next trip, stating an agreement has been made between himself and Mr. Bunnett that each will recommend to his respective insurance carrier to pay $100.00 to Mr. Laird without prejudice and on account. Mr. Blek agrees in the request on this understanding, and Mr. Laird also states that he is satisfied to have the continuance granted. If possible the parties are to mail their further medical evidence to me before my next trip and It Is Stipulated that if I receive from Mr. Blek and Mr. Weingand further documentary evidence with service of copy on each other, and consent to an immediate decision, that a further hearing may be cancelled and decision issues at once.

REPORTER'S CERTIFICATE

I Hereby Certify that the foregoing is a true and correct transcript of the testimony and proceedings at the hearing held at Hearing Room of State Industrial Accident Commission, State Building, Los Angeles, California, on September 15, 1942.

/s/ SARA T. LONGLEY,
Reporter.

Filed Oct. 13, 1942.

Copy forwarded to Washington.

Received Oct. 3, 1942, District No. 13.

United States Employees' Compensation Commission Before Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District.

Case No. DB-8, Claim No. DB-13

FRED F. LAIRD,

Claimant,

vs.

CONTRACTORS, PNAB, and BUILDERS PEARL HARBOR DRY DOCK No. 4,

Employers,

LIBERTY MUTUAL INSURANCE CO., U. S. FIDELITY & GUARANTY CO.,

Insurance Carriers.

TRANSCRIPT OF TESTIMONY AT HEARING

October 5, 1942

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at Hearing Room of State Industrial Accident Commission, State Building, Los Angeles, California, on the 5th day of October, 1942, at 2:30 p.m.

Appearances:

Claimant present in person and represented by Mr. C. L. Blek, Attorney, 349 E. Manchester Avenue, Inglewood, California.

Defendants represented by Mr. Donn Downen, Attorney, appearing for Mr. Claude F. Weingand, Atty., 939 Rowan Building, Los Angeles, California.

FRED F. LAIRD

Deputy Commissioner Pillsbury (to Claimant):

Q. Did you receive, Mr. Laird, $100.00 on account from each of the Insurance Companies?

A. Yes.

The Deputy Commissioner: Mr. Downen offers report of Dr. Mark A. Glaser of September 8, 1942. Received in evidence as Exhibit "A" of this date.

(To Mr. Downen): Mr. Downen, have you anything further to offer?

Mr. Downen: Yes.

The Deputy Commissioner: Before that, I understand from the recent medical report of the operating physician that Claimant needs another operation. Does claimant wish to have another operation?

Mr. Blek: He doesn't want it unless it is necessary. He wants to get well.

The Deputy Commissioner (to Claimant): Are you asking for another operation, Mr. Laird?

Mr. Laird: If it is necessary.

The Deputy Commissioner: Mr. Downen, do you want to offer the operation?

Mr. Downen: The controversy as I have it is twofold—first, whether or not another operation is necessary and if Claimant is entitled to it and if he

(Testimony of Fred F. Laird.)

is, who will bear the expense and that involves the question of each accident. In the event we are found liable for it we will offer the operation ourselves.

Cross-Examination

By Mr. Downen:

Q. Mr. Laird, you remember that on July 7, 1942, a representative of the P.B.A.N. called upon you and took a statement of this accident?

A. Yes.

(Mr. Downen hands statement to Mr. Blek to read.)

Q. You have read the statement here and is the same statement which was taken from you on July 7th? A. Yes.

Mr. Downen: I will offer this in evidence. There is no signed signature but he has identified it as being the same statement.

The Deputy Commissioner: Who is the representative who took the statement?

Mr. Downen: I don't know but I can check that from the file if you wish.

Q. The Deputy Commissioner (To Claimant): Mr. Laird have you read this statement from the handwriting of the adjuster in full?

A. Not the handwriting but I have read the printed statement.

Q. Do you believe the statement you made is true?

A. There is only one thing that I think he mis-

(Testimony of Fred F. Laird.)
understood me, that is he says I didn't report the accident. I did.

The Deputy Commissioner: With that explanation of the witness I will receive the statement as Exhibit "B".

Cross-Examination (Continued)

By Mr. Downe:

Q. When you went to Dr. Glasser did he have a copy of the statement? A. Yes.

Q. Did he ask you if that was a correct statement? A. I don't believe he did.

Q. Did you tell him that was a correct statement?

A. I told him I gave that statement before but at the time I was a little hazy.

Q. There is a typed copy attached to the statement. You state (Reading from statement): "While we were lifting the derrick I felt a very sudden sharp pain in my back. It came on when I was lifting on that derrick for the first time. The pain was right in my backbone and about two inches above my hip line. I continued lifting but did not do much. I played off on the boys. After the derrick got moved I went back to filing saws. This all happened about 11:00 A.M. or thereabouts. I am not sure of the time. That evening I reported to the First Aid Station but there was no doctor. The male nurse gave me a heat treatment. He was the first one I reported the accident to."

Is that substantially a correct statement of what happened? A. Yes.

(Testimony of Fred F. Laird.)

Q. In other words about 11:00 o'clock in the forenoon you got a sharp pain in your back. Is that correct? A. That is right.

Q. After the derrick got moved you went back and started to file saws for the rest of the day?

A. No, I went back to filing saws and told Mr. Davis and he immediately told me to report to the First Aid man.

Q. What did you do?

A. I went to report and he wasn't there. I think I went just before lunch and he wasn't there and I went back after lunch and he still wasn't there.

Q. And after that you went back to filing saws?

A. No, I never worked another lick.

Q. This is substantially correct as I continue: "The next day I waked up and had a burning sensation running from the point where I had the original pain running across my right hip and down my right leg in the side and back of the leg about ⅓ of the way down to my knees. I went to the First Aid nurse and got two heat treatments that day. That evening he called the Marine Doctor from Sand Island who examined me and said I had a sacroiliac slip. He recommended more heat treatment. I continued with the heat treatments for three days." That was the 3d, 4th and 5th?

Mr. Blek: The accident was on the 2d.

The Witness: The accident was on December 2d.

Q. The next treatment would be on the 3d and

(Testimony of Fred F. Laird.)

you were seen by the Marine Doctor on the 3d. Is that correct? A. I believe it was.

Q. You continued with the heat treatments until you left? A. Yes, sir.

Q. (Reading from statement): "My eyes were bad from saw filing and I got leave to go to Honolulu to get glasses fitted. I left Johnson Island December 5, 1941 and got in Honolulu on December 10, 1941." Is that correct?

A. Yes, only the nurse said "so long as you are not able to work you might as well get your glasses and come back."

Q. You subsequently went to Honolulu and got your glasses fitted? Is that correct? A. Yes.

Q. Then on Dcmber 13, 1941 you said, "I went to Mr. Nichols and he told me 'You ain't going back to Johnson Island.'" He said, "I am going to loan you to Pacific Bridge." Did that occur?

A. Yes, and he said "Go on out."

Q. You went to Johnson Island? A. Yes.

Q. You went to work as a carpenter?

A. I tried but couldn't and they put me on as a carpenter foreman.

The Deputy Commissioner (To Mr. Downen): You are reading almost the entire statement.

Mr. Downen: As you will notice, the report of the doctor which was filed today was predicated on this history.

The Deputy Commissioner: He has stated he made this statement with one modification. If there

(Testimony of Fred F. Laird.)

is anything of any importance you may bring it out but I will ask you not to read the whole statement.

Mr. Downen: Very well. No further examination along that line.

Q. (By Mr. Downen): I notice you went to work after you arrived on the mainland for Northrup Aviation and I notice there were two or three weeks you were off.

A. I was off two weeks solid and then was off from time to time until I had to quit, doing my best to make my family a living.

Q. I notice in Dr. Collins' report during the time you were off you received some payments from Northrup? A. That was Group Insurance.

Q. What sort of report did you make to entitle you to those payments?

A. I told him I was pretty hard up and he said: "I will pay it and if we are not liable we will trust you to pay it back."

Q. Do you recall what type of policy this was?

A. There is three different policies. There is hospital and weekly benefit and sick and accident.

The Deputy Commissioner: I am not particularly interested as to what type of insurance it is.

Mr. Blek: As a matter of fact they are now demanding all the money back.

The Deputy Commissioner: That is immaterial.

Mr. Downen: Apparently they did not pay unless they had a report of an accident and we want to find out if there was a subsequent accident.

(Testimony of Fred F. Laird.)

The Deputy Commissioner: I think you better do your investigating outside the record of this case.

(Discussion off record.)

Q. (By Mr. Downen): Did you suffer any further injury or strain to your back during the time you were working at Northrup Company?

A. All I suffered was from the accident I had prior to my coming there.

The Deputy Commissioner: Did you have any new accident?

The Witness: No, sir, I didn't. All I handled was a screwdriver that long (indicating four inches).

Mr. Downen: I will ask for a continuance.

Redirect Examination

By Mr. Blek:

Q. As a matter of fact they have demanded the money back they advanced to you claiming you are not entitled to it? Is that right?

A. That is correct.

Mr. Blek: I think this has gone on a long time and the matter should be submitted.

The Deputy Commissioner: This is the fourth hearing and after the third hearing I get increasingly reluctant to further continuance.

Mr. Downen: I am asking for a hearing at Honolulu. We have certain evidence there we deem important.

The Deputy Commissioner: I think after four hearings you should file a statement of merits in

(Testimony of Fred F. Laird.)

regard to your request. Claimant is in need of decision. You may file with me within five days a statement of the name of each witness and what you expect to prove by him.

Mr. Downen: I believe there was an advance made in this case.

Mr. Blek: Yes, $100.00 from each Company.

The Deputy Commissioner (To Mr. Downen): Will you accompany your request with an agreement to pay further compensation during the time the matter is pending?

Mr. Downen: Yes, we will file an agreement.

The Deputy Commissioner: If compensation is paid there will be no hardship.

Mr. Blek: If they will make some arrangement to pay Mr. Laird reasonable compensation we have no objection to continuance.

The Deputy Commissioner: They if such an undertaking is made and the request shows there is some relevancy for a continuance I will take the matter under consideration. Hearing closed except for the possibility of further proceedings in Honolulu.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings at the hearing held at Hearing Room of State Industrial Accident Commission, on the 3d day of October, 1942.

/s/ SARA T. LONGLEY,
Reporter.

EXHIBIT "A"

Hearing 10/5/42

Case No. BA-8 Fred F. Laird

(Excerpt from report of Dr. M. A. Glaser dated Sept. 8, 1942.)

* * *

Discussion:

Mr. Laird still complains of some dull aching pain and stiffness particularly upon bending, however, there is an absence of pain radiating down into his foot. Today, 9-14-42, he reported to my office and states that for the past three or four days he has had more intense pain in the "joint where the ring was taken out", and when he coughs it feels "like it is breaking in two". His back still bothers him sufficiently to keep him from performing even light work because he states that if he is on his feet any length of time he develops a headache and has aching in his back which is weak.

It is my opinion Mr. Laird is still disabled for the performance of his work as a carpenter foreman. This disability is due to a residual of a ruptured intervertebral disc as a developing psychoneurosis. His headaches are not due to any back disability but are caused by neurotic manifestations.

It is my opinion that at the time of his first injury 12-2-41 that without doubt the ligaments that support the nucleus pulposus were weakened. At this time he did not have a complete rupture of the nucleus pulposus because if this had occurred the

Exhibit A—(Continued)

pain would have been so intense he could not have continued working the remainder of the day. He stopped work the next day. On December 14th or 15th he returned to work as a carpenter foreman and continued working until January 13, 1942 when he was again carrying out some lifting and had a recurrence of his pain, however, he continued working until January 28, 1942 at this time he started to return to the mainland.

In view of the history of these two injuries it is further my opinion the first injury caused a beginning weakness of the ligaments supporting the nucleus and the second injury completed the relaxation of the ligaments. These two injuries together resulted in such a relaxation of the ligaments supporting the nucleus that a gradual complete rupture occurred. As a matter of fact a ruptured intravertebral disc may occur without injury and be due to a degenerative process. I do not see how any surgeon can place the cause of a ruptured intravertebral disc upon either of these injuries to the exclusion of the other when we know these ruptures may occur spontaneously without the history of injury.

Present Disability:

Total for the next three to six months. If his nervousness increases disability may be prolonged.

Permanent Disability:

I do not look forward to any permanent disability.

Exhibit A—(Continued)

Treatment:

He should wear a support as he is now doing, perform exercises to strengthen his back, and have sedatives for his nervousness. If his nervousness increases I would recomment settlement of this case.

Mark Albert Glaser, M. D.
1118 Roosevelt Building

Los Angeles, Calif.

September 8th, 1942

Injured
Laird, Fred. Age 31.

Referred by
Mr. C. Weingand

Examined at
Office, 9/8/42.

Employer
Contractors Pacific Naval Air Base

Date of Injury
December 2, 1941

Occupation
Carpenter

Complaint
1. Stiffness of back.
2. Pain in back.
3. Back feels weak.

Exhibit A—(Continued)

Diagnosis

1. Residual of a ruptured intervertebral disc.
2. Beginning psychoneurosis.
3. Spinal fusion absorbed.

Family History

Mother died at 53, pneumonia; father died at 43, pneumonia. Four brothers and one sister living and well. One brother and one sister deceased.

Familial diseases—0.

Marital—married at 19, wife living and well at 31, patient has a son 7 years old and a stepson 13 years old.

Past History

Born in Phelps, Missouri, November 11, 1910.

Residence and occupation—0-29 Missouri, 8th grade, filling station attendant, marble worker, carpenter, construction work. 29-31 California, worked for the American Alumnin Co., October 27, 1940 to May 6, 1941. On May 8, 1941 went to Johnston Island, T. H., worked as a carpenter and returned to California on February 19, 1942.

Diseases—Chickenpox, measles, mumps. Venereal—denied.

Habits—Coffee, 1 cup a day. Tea—0. Alcohol—0. Tobacco—10 cigarettes a day. Narcotics—0.

Accidents—0.

Exhibit A—(Continued)

Operations—Laminectomy, July 9, 1942, Dr. M. Taylor, Dr. Leslie Grant and Dr. A. J. Neufeld.

General

Appetite—Normal. Sleep—Fair. Bowels—Normal. Nocturia—0.

Present Illness

In as much as my conclusions (which are set forth in this report under the caption discussion) are in no small part based upon the history given by the patient and in order to rule out the possibility of error in diagnosis, primarily predicated upon a faulty or incomplete history I exhibited to Mr. Laird the original of this statement dated July 7, 1942, which Mr. Weingand forwarded to me prior to the date of my examination and asked Mr. Laird if the facts and information in the statement contained were true and represented his exact complaints as they occurred. He replied in the affirmative. This statement of the facts involving Mr. Laird's two claimed accidents reads as follows:

"Report of Fred L. Farid, born on Nov. 11, 1910 in Phelps, Missouri. I am married and have two boys. I live at the above address. On April 27, 1941 I signed a contract to work for the Pacific Naval Air Bases, Contractors as a painter's helper at a wage of $135.00 a month and subsistence. I sailed on the S. S. Matsonia from Wilmington, Calif. on May 8, 1941. I arrived in

Exhibit A—(Continued)

Honolulu, Hawaii T.H. May 14, 1941 and left there on June 13, 1941 for Johnson Island and arrived June 15, 1941. I did no work at all in Hawaii. I was paid in full for this time. I worked a while as a painter on Johnson Island after my arrival I was made a carpenter at a wage of $200.00 a month plus time and one half for overtime and subsistence. I worked steadily until sometime in July, 1941 when I got food poisoning. I was off work two or three days but was paid full wages. About 400 of us were laid up at that time. I went back to work and worked steadily as a carpenter until early in December of 1941. One day in December (before December 7, 1941) I was working in the carpenter shop. Leroy Decker was with me. There was a steel stiff lef derrick lying in the ground in front of the shop. It was going to be used to put up an oil tank. Its weight was between 1200 and 1500 lbs. It is constructed of two steel shafts forming an "L" which cable to turn the cross arm. It is used to pick up sheet iron. This was lying in front of the entrance of our shop. A truck came to haul away scrap and the driver wanted to back into the shop but the stiff leg derrick was in the way. About ten of us men among whom was Robert McDonald. He is now somewhere in Alaska. Leroy Decker was also there. L. M. Mathes was also there. They are the only ones whose names I recall. We all straddled the der-

Exhibit A—(Continued)

rick. We then bent down with knees bent. We lifted the derrick about 6 inches off the ground and carried it a few inches and let it down. We then carried and dragged it about 15 or 20 feet. I was asked to do this by Leroy Decker. He called me off my job of filing saws to do the lifting. I was in the back end of the derrick. While we were lifting the derrick I felt a very sudden sharp pain in my back. It came on when I was lifting on that derrick for the first time. The pain was right in my backbone and about 2 inches above my hip line. I slacked loose of the derrick but did not let go completely. I did not say anything about it. I had the severe sharp pain for most of the day. I continued the lifting but did not do much. I played off on the boys. After the derrick got moved I went back to filing saws. This all happened about 11:00 A.M. or thereabouts. I am not sure of the time. That evening I reported to the first aid station but there was no doctor. The male nurse gave me a heat treatment. He was the first one I reported the accident to. The next day I woke up and I had a burning sensation running from the point where I had the original pain running across my right hip and down my right leg in the side and back of the leg about ⅓ of the way down to my knee. It is hard to say just where it was. I was unable to work. I could not bend and walked only with great difficulty. I went to the first aid nurse

Exhibit A—(Continued)

and got two heat treatments that day. That evening he called a marine doctor from Sand Island who examined me and said I had a sacroillac slip. He recommended more heat treatment. I continued with the heat treatments for three days. My eyes were bad from saw filing and I got leave to go to Honolulu to get glasses fitted. I left Johnson Island Dec. 5, 1941 and got in Honolulu on Dec. 10, 1941. I did not work at all on Johnson Island after the day of my accident. I was paid in full through that time. The agreement on Johnson was that I was to return. I got a pay check at the Contractor's Hotel. On December 13, 1941 I went to the personal office of the Contractor's. I told Mr. Nichols I was ready to go back to Johnson. I had seen no doctor about my back. I had my glasses fitted before I went to Mr. Nichols. He told me "You aint going back to Johnson Island". He said "I am going to loan you to Pacific Bridge." My hiring number was 27463 and I reported for work on Dec. 14, 1941 or Dec. 15, 1941. I was a carpenter foreman with a wage of $1.25 per hour and time and a half for overtime. I made about $117.00 to $119.00 a week. I still had an uncomfortable feeling in my back. I never mentioned my accident to Mr. Nichols. The Pacific Bridge changed the name to Builders Drydock #4 at the first of the year. I then got a #943. I still got my pay from Pacific Bridge under #27463. Every week or

Exhibit A—(Continued)

two I got a number. I worked steadily until January 13, 1942. On that day we had a there was a section about 14 feet long and 7 feet high with 2x6 studding. There was a double 2x6 plated top and bottom. It was boxed up with ship laps. This was of wood. A bunch of us were to lift this. L. M. Mathis was there at the time. The section was blocked up. We all got along one side and bent down to lift up the section to turn it over into another section to form a stack. As I was lifting up I got the same pain again except it was also over my right front hip and right groin. I had my right foot in an oil spot from where we had greased the form and when the pressure came on, my right foot slipped backward when it got to the dry cement it caught and that is when I felt the pains. I let go of the form and quit doing the lifting. I went back to being foreman instead of giving the boys a lift. I had not done any lifting before because my back was not feeling right and I kept away from it as much as I could. I reported to Geo. McLanahan the time keeper of the Builders Pearl Harbor Dry Dock #4. I reported to him Jan. 13, 1942. The accident occurred about 8:00 A.M. and I reported it about 11:00 A.M. He sent me to the Alsup Clinic thinking I was a PNAB man which I was supposed to be. I was paid by Pacific Bridge in error. He examined me and said I probably tore a ligament in my right side and sent me back to

Exhibit A—(Continued)

work. I worked to Jan. 28, 1942 as best I could. On a second visit to Dr. Alsup he said "It looks like you are going to have a hernia and we will have to operate and fix it." I said I wanted to go to the mainland for an operation. I saw Mr. Baine and Platt at the contractors and told them what the Alsup Clinic told me. They said I should get a letter from Dr. Alsup saying I was unable to work and recommend I be returned to the mainland. This was after January 28 when I was unable to work. The same pain in my back was present. Baine and Platt said I would be put back in PNAB payroll and would pay my full wages ($200.00) a month until I got to the states. I arrived in San Diego on February 14, 1942. I have been paid only through January 25, 1942. I had a hearing in Honolulu but was not present as It was not to be held Feb. 24, 1942. This was held by Commissioner Schmitz. I was all in after my arrival in the states and did not work until March 30, 1942. I went to work for Northrup Aviation in Hawthorne. I worked until June 4, 1942 and have done no work since. Between March and June 4 I was off work 2 wks. a day or so at a time in addition. I was off about 3 weeks in all. I did not trust myself there. I did no lifting or any heavy work there at all. I went to Dr. Leslie Grant, 3130 So. Manchester on June 3, 1942. I have been under his care ever since. I went to Dr. Thompson, 920 La Brea Inglewood

Exhibit A—(Continued)

one day last week. I was sent to Dr. G. Mosser Taylor Wilshire Blvd., by Dr. Grant. He said I had a ruptured disc in my back. I thought it was a typical case. No time for the operation has been set but it will be in the next few days. I never had had any trouble with my back before Dec. 1941. I have never had any other accidents than described in this report. Before going with PNAB I worked for Aluminum Co. of America. I was with them from Oct. 1940 until May 1941. Before that I was with Carthage Marble Corp. of Carthage, Mo. I was with them for almost ten years. I worked there from 1929 until June 1940. I have received no pay from PNAB since Dec. 5, 1941. I was paid full wages by Pacific Bridge from Dec. 14, 1941 through January 25, 1942. Since Jan. 28, 1942 I have received no pay from either. I am still owed wages from Jan. 28 to Feb. 14 at $200.00 a month plus a $45.00 bonus. I have received no compensation insurance from any company from my injury. My back is getting worse all the time."

On July 9, 1942, laminectomy was carried out and a disc was removed. Since then Mr. Laird states that he is very much better but he has a dull aching, and stiffness in his back and has shown some improvement but has not improved sufficient to permit him to return to work. Now he states his back is stiff, feels weak and when he bends to either side or forward and backward

Exhibit A—(Continued)

he has pain, between the 4th and 5th lumbar. Prior to the operation the pain was always present and there was a burning sensation radiating down the right thigh to the knee, then down both sides of the leg and into arch of the foot. Since the surgery the pain and burning have subsided and this pain and burning down the leg have "all gone". Now there is stiffness of the back and if he exerts himself there is a tension and drawing in his back and it feels like he is forcing something. If he is on his feet any length of time he has a headache and has an aching in his back.

He further states that anytime after a year he will be able to do light work without any bending. It is very disagreeable to try and work with the brace, and if he leaves the brace off the muscles draw up and he is afraid that if he relaxes his muscles something will happen and he feels like something is going to give away and his head will start to ache. Mr. Laird states that he is still very nervous and any excitement "sets me to shaking all over".

Physical Examination

General

Ambulatory. Weight 140 pounds, height 5′7¾″. Blood pressure 115/80.

Skin

Normal.

Exhibit A—(Continued)

Hair

Normal.

Eyes

Normal.

Lymph Nodes

Normal.

Ears

Cerumen in right ear, tympanic membrane not visible. Left normal.

Nose

Normal.

Mouth

Teeth—in good condition. Tonsils—buried, cryptic.

Neck

Normal.

Chest

Normal.

Abdomen

Scar right upper abdomen.

Vascular

Normal.

Genitalia

Normal.

Rectal

Not examined.

Exhibit A—(Continued)

Spine

Laminectomy scar, tenderness over this scar. V shaped scar over the sacrum. Bend forward to within 40 cm. of the floor. Bending to the right, to the left and backward is limited. Straight leg raising to 120 degrees on the left and 110 degrees on the right causes back pain. Knee to abdomen on the right and left is painful. Bends 10 degrees more on the left than on the right. Lies down on examining table easily because of back.

Extremities

Tattoo mark on left arm.

Supports

Wears a back brace.

Neurological Examination

Head

Normal as to shape and size.

Cranial Nerves.

I. Olefactory: Normal.
II. Optic: Normal.
III. Oculo-Motor: Normal.
IV. Trochlear: Normal:
V. Trigeminal: Normal.
VI. Abducens: Normal.
VII. Facial: Normal.
VIII. Acoustic: Tuning-fork #256 heard 4 cm. from both ears.
IX. Glossopharyngeal: Normal.

Exhibit A—(Continued)

X. Vagus: Normal.

XI. Spinal Accessory: Normal.

XII. Hypoglossal: Normal.

Cerebrum

I. Frontal: Normal.

II. Central: Right handed. Grip 165 right hand; 180 left hand.

III. Parietal: Normal.

IV. Temporal: Normal.

V. Occipital: Normal.

Cerebellum

Normal.

Miscellaneous

I. Speech: Normal.

II. Tremor: Negative.

III. Gait: Limps.

IV. Signs: Negative.

Reflexes	Right	Left
Biceps	xx	xx
Radial	xx	xx
Ulnar	xx	xx
Triceps	xx	xx
Upper abdominals	xx	xx
Lower abdominals	xx	xx
Cremasteric	xxxx	xxxx
Patellar	xxx	xxx
Achilles	0	xxx
Pathological Reflexes	0	0

Exhibit A—(Continued)

Motor

Limitation of back movements in all directions.

Sensory

Sensation diminished over the right leg posteriorly and anteriorly from the knee to the toes.

Laboratory Report Mona E. Bettin, M.D. 9-9-42

Wassermann test on blood serum—negative.

Precipitation test—negative.

X-Rays Rolla G. Karshner, M.D. August 24, 1942

"Roentgen examination including anteroposterior stereo and lateral projections of the lower dorsal, lumbar and lumbosacral spine reveals no evidence of fracture, dislocation or other injury to any bone or joint. There is no gross anomaly.

There is evidence of hypertrophic arthritis manifested by slight sharpening of vertebral margins. There is increased density over the articulations between the fifth lumbar vertebra and the sacrum indicating a hypertrophic arthritic process. There is hypertophic bony deposit about the margins of the upper portion of the right sacroiliac joint. The arthritis is of origin prior to the alleged injuries of 12-2-41 and 1-13-42. The space between the fourth and fifth lumbar vertebrae is clear. I cannot demonstrate defect in either lamina of either the fourth or fifth lumbar vertebra. In lateral projection I get the impression that the tip of the spinous process of the fifth lumbar vertebra may have been whittled off a bit; in anterioposterior projection there is a

Exhibit A—(Continued)

rectangular bony shadow approximately one centimeter in its greater diameter between the spinous process of the fifth lumbar vertebra and the spinous process of the first sacral segment. I cannot say that it is connected by bony union to either vertebra."

X-Rays Edward S. Blaine, M.D. (9-14-42)

"X-ray shadows appear to represent an essentially normal bone and joint anatomy of the lumbosacral structures. There are minor amounts of hypertrophic osteoarthritis at edges of several of the articular surfaces of lower lumbar and sacroiliac joints. The intervertebral cartilage spaces are clear and of normal size. The spinous processes and the lamina portions of each of the lower lumbar vertebrae appear to be intact. I find no shadow indication of changes such as would represent operative procedure in the regions included in this examination. Stereoscopic anteroposterior and lateral projections plus a special sagittal view from below upwards, all represent normal findings."

Discussion

Mr. Laid still complains of some dull aching pain and stiffness particularly upon bending, however, there is an absence of pain radiating down into his foot. Today, 9-14-42, he reported to my office and states that for the past three or four days he has had more intense pain in the "joint where the ring was taken out", and when he

Exhibit A—(Continued)

coughs it feels "like it is breaking in two". His back still bothers him sufficiently to keep him from performing even light work because he states that if he is on his feet any length of time he develops a headache and has aching in his back which is weak.

It is my opinion Mr. Laird is still disabled for the performance of his work as a carpenter foreman. This disability is due to a residual of a ruptured intervertebral disc as well as a developing psychoneurosis. His headaches are not due to any back disability but are caused by neurotic manifestations.

It is my opinion that at the time of his first injury 12-2-41 that without doubt the ligaments that support the nucleus pulposus were weakened. At this time he did not have a complete repture of the nucleus pulposus because if this had occurred the pain would have been so intense he could not have continued working the remainder of the day. He stopped work the next day. On December 14th or 15th he returned to work as a carpenter foreman and continued working until January 13, 1942 when he was again carrying out some lifting and had a recurrence of his pain, however, he continued working until January 28, 1942 at this time he started to return to the mainland.

In view of the history of these two injuries it is further my opinion the first injury caused a beginning weakness of the ligaments supporting

Exhibit A—(Continued)

the nucleus and the second injury completed the relaxation of the ligaments. These two injuries together resulted in such a relaxation of the ligaments supporting the nucleus that a gradual complete rupture occurred. As a matter of fact a ruptured intravertebral disc may occur without injury and be due to a degenerative process. I do not see how any surgeon can place the cause of a ruptured intravertebral disc upon either of these injuries to the exclusion of the other when we know these ruptures may occur spontaneously without the history of injury.

Present Disability

Total for the next three to six months. If his nervousness increases disability may be prolonged.

Permanent Disability

I do not look forward to any permanent disability.

Treatment

He should wear a support as he is now doing, perform exercises to strengthen his back, and have sedatives for his nervousness. If his nervousness increases I would recommend settlement of this case.

/s/ MARK ALBERT GLASER, MD.

Filed Oct. 23, 1942.

Copy forwarded to Washington.

Received Oct. 23, 1942. District No. 13.

United States Employees' Compensation Commission, Before Warren H. Pillsbury, Deputy Commissioner 13th Compensation District

Case No. DB-P-1-715

FRED F. LAIRD,

Claimant,

vs.

BUILDERS, PEARL HARBOR DRYDOCK #4, also known as PACIFIC BRIDGE CO.,

Employer.

U. S. FIDELITY & GUARANTY CO.,

Insurance Carrier.

FRED F. LAIRD,

Claimant,

vs.

HAWAIIAN DREDGING COMPANY, also known as CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer.

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United

States Employees' Compensation Commission, at Room 406, United States Post Office Building, Los Angeles, California, on Monday, the 13th day of September, 1943, at 4:00 P.M.

Appearances

Claimant present in person and represented by Mr. C. L. BLEK, attorney at law.

Defendants, Pacific Bridge Company and U. S. Fidelity & Guaranty Company represented by Mr. F. W. BONNETT, attorney at law.

Defendants, Hawaiian Dredging Company and Liberty Mutual Insurance Company represented by Mr. C. F. WEINGAND, attorney at law.

Mr. Pillsbury: Hearing on application for allowance of certain medical bills. Claimant present in person, and represented by Mr. C. L. Blek, attorney at law, Inglewood, California.

Defendants, Pacific Bridge Company and U. S. Fidelity & Guaranty Company represented by Mr. F. W. Bonnett, attorney at law.

Defendants, Hawaiian Dredging Company and Liberty Mutual Insurance Company represented by Mr. C. F. Weingand, attorney at law.

In this case I entered compensation orders in each proceeding upon a consolidated transcript on November 3, 1942. It appeared that claimant's disability for which the claim was brought was the combined result of two accidents, one sustained in

each employment. In my first order I awarded compensation at the rate of $12.50 a week until further order against Builders, Pearl Harbor Drydock No. 4 and U. S. Fidelity & Guaranty Company. In the second order I awarded compensation at the rate of $12.50 a week against Contractors, Pacific Naval Air Bases, and Liberty Mutual Insurance Company. Each order was for one-half of the compensation payable for total disability. I note at this time that there has been some confusion in the titles in the transcript of testimony with reference to the correct name of each of the two employers, which should be corrected. I understand that Builders, Pearl Harbor Drydock #4 is a subsidiary, or another name for Pacific Bridge Company. Is that correct, Mr. Bonnett?

Mr. Bonnett: I think that is correct.

Mr. Pillsbury: And which title would you prefer to have in the future orders?

Mr. Bonnett: Pacific Bridge.

Mr. Pillsbury: Stipulated that the orders from now on may refer to said employer under the name of Pacific Bridge Company.

With reference to the employer in the second case, it appears to have been variously described as Hawaiian Dredging Company and Contractors, Pacific Naval Air Bases. I understand that the latter is correct in that Contractors, PNAB has carried the contracts for a number of associated companies, including Hawaiian Dredging.

Mr. Weingand: That is correct.

Mr. Pillsbury: Stipulated that the true name of the employer to appear in the record from now on may be Contractors, Pacific Naval Air Bases?

Mr. Weingand: So stipulated.

Mr. Pillsbury: It is understood that the insurance of the employers as hereinbefore found is undisputed, each insurance policy protecting each employer under each name.

With reference to the request for allowance of further medical bills, it is stipulated after informal discussion that an order may be entered, or the Deputy Commissioner may advise the defendants informally that further sums incurred by claimant for medical treatment may be awarded to him and the bills paid, as follows:

$86.26 to Dr. L. C. Grant, for medical service rendered at the claimant's request prior to his operation.

$124.26 to Centinela Hospital for hospital care furnished claimant at the time of his first operation.

This hearing was also set upon informal request by claimant for lump sum award. Formal petition on the prescribed form is filed by claimant, signed by him, and ordered filed at this time.

Mr. Weingand raises a question as to whether claimant should not be provided with further operation which might cure him and thereby reduce the amount of total compensation payable. This issue may be further developed by the parties. Claimant states that he desires to buy a grocery store and that it has been inspected by the State of California

Bureau of Rehabilitation. Will you get them to write me a letter on this?

FRED F. LAIRD

claimant, testified as follows:

Q. (By Mr. Pillsbury): Mr. Laird, you have been sworn before. First, has there been any change in your condition since the last order? A. No.

Q. Are you able to return to your former work?

A. No.

Q. Are you able to engage in regular labor in your mechanical work?

A. Not in manual labor. I can do bench work.

Q. What is your condition now?

A. Just lame, no strength in my back.

Q. Tell me about this grocery store.

A. It is at 1060 East Hyde Park Boulevard, Inglewood.

Q. How big is it?

A. 30 foot front, and about 30 feet deep.

Q. How many people are required to run it?

A. About three, my wife, my son and myself.

Q. How many are running it now?

A. Three—four part of the time.

Q. I mean before you buy it. How many does it take? A. Him and his wife and his son.

Q. You state there is a butcher shop now that you will sub-lease?

A. I will rent it back to the man that formerly owns it. He will be there to help.

Q. Lease it?

(Testimony of Fred F. Laird.)

A. Rent it back to him, not lease it.

Q. What is the purchase price offered you?

A. Around $5,000.

Q. How is that made up?

A. Made up of—he is going to show me the bills of what he paid for the fixtures. He asks no profit, just what he paid for the fixtures. And the cost price on the stock, to invoice it out at the wholesale price. And he says the stock will run $2,500, up or down.

Mr. Pillsbury: Mr. Blek, any questions?

Mr. Blek: No. I think it would be a good thing if we could get Mr. Laird to the point where he is self-supporting, that it would help him and the community, and I have made some investigation of this property, not just to advise him on it. I know the man who is selling it, and he is thoroughly reliable.

Mr. Pillsbury: Do you think Mr. Laird has had sufficient experience?

Mr. Blek: I do not say he personally, but his wife and son have worked for the past two years about six or seven blocks away from this market, so they are familiar with the neighborhood and with their assistance, and they are both willing to work, I think he could very easily make a success of this business.

Mr. Pillsbury: Mr. Bonnett, any questions?

Q. (By Mr. Bonnett): When was your last medical? A. About a month ago.

(Testimony of Fred F. Laird.)

Q. By whom?

A. Dr. Chaffin. Month and a half, something like that. His advice to me—I asked his honest opinion what should I do, and he said "Off the record, I would advise you not to touch it again."

Q. Who is that? A. Lawrence B. Chaffin.

Mr. Pillsbury: Mr. Weingand.

Mr. Weingand: Let the record show that the defendant Liberty Mutual Insurance Company does not voluntarily acquiesce in the proceedings which have been initiated this afternoon on the application for a lump sum award.

Mr. Pillsbury: Then do you wish a continuance to present your memorandum?

Mr. Weingand: I do, and I wish to have the application for lump sum award formally served on my company and my assured, and I ask for the statutory time within which to prepare a defense.

Mr. Pillsbury: Granted. Anything further today?

Hearing continued to my next trip, October 4th.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on September 13, 1943.

/s/ HELEN SCHULKE,
Reporter.

Received Sept. 18, 1943. District No. 13.

Copy forwarded to Washington.

Filed Sept. 18, 1943.

United States Employees' Compensation
Commission, Before
Warren H. Pillsbury,
Deputy Commissioner
13th Compensation District

Case No. DB-P-1-715

FRED F. LAIRD,

Claimant,

vs.

CONTRACTORS, P.N.A.B.,

Employer.

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

FRED F. LAIRD,

Claimant,

vs.

BUILDERS PEARL HARBOR DRYDOCK #4,

Employer.

U. S. FIDELITY & GUARANTY COMPANY,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

October 18, 1943

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission at

Room 657, United States Post Office Building, Los Angeles, California, on Monday, the 18th day of October, 1943, at 11:00 o'clock a.m.

Appearances

Claimant present in person and represented by C. L. BLEK, attorney at law.

Defendants, Contractors P.N.A.B. and Liberty Mutual Insurance Company represented by CLAUDE F. WEINGAND, attorney at law.

Defendants Builders Pearl Harbor Dry Dock #4 and U. S. Fidelity & Guaranty Company, represented by MISS MARJORIE GLEASON, Claims Adjuster.

Mr. Pillsbury: Continued hearing on application for lump sum award. At the hearing held September 13th the matter was adjourned for consideration of the question of a further operation, which would have a bearing on the amount of compensation for a lump sum which could be requested, also for further evidence on the general question of the application for lump sum.

Claimant is present and is represented by Mr. C. L. Blek, attorney at law. Defendants, Pacific Bridge Company and U. S. Fidelity & Guaranty Company, are represented by Miss Marjorie Gleason, Claims Adjuster. Defendants, Contractors, P.N.A.B. and Liberty Mutual Insurance Company, represented by Mr. Claude F. Weingand, attorney at law.

FRED F. LAIRD

claimant, testified as follows:

Q. (By Mr. Pillsbury): Mr. Laird, has there been any change in your situation since the last hearing? A. No.

Q. Are you working now? A. Yes.

Q. What are you doing?

A. Light clerking around a grocery store.

Q. In the store you desire to purchase?

A. Yes.

Q. How much are you making?

A. $25 a week, just enough to learn the business.

Mr. Pillsbury: Mr. Weingand offers a report of Dr. Lawrence Chaffin of September 30, 1943; received in evidence as Exhibit A.

Report of Dr. Carl W. Rand of October 4, 1943, received as Exhibit B.

Dr. Chaffin does not apparently comment on the question of further operation, and Dr. Rand states that no further operation is indicated. Does that dispose, Mr. Weingand, of the question of operation?

Mr. Weingand: It does, but the two reports bring up two additional questions, the probability of a moderate improvement with time and use. You notice that Dr. Chaffin says that eventually the man may have a very small amount—you can read what it says—or some slight permanent disability.

Mr. Pillsbury: You are not tendering an operation or insisting on it?

(Testimony of Fred F. Laird.)

Mr. Weingand: No, sir, not at this time.

Mr. Pillsbury: Are you requesting another operation, Mr. Laird?

Mr. Blek: No. You will recall Mr. Weingand and Mr. Bonnett thought if an operation was performed that Mr. Laird would be completely cured and that would have a bearing on the lump sum.

Mr. Pillsbury: I will disregard the contention unless the operation is requested by the defendants.

Q. Is there anything more you wish to state, Mr. Laird, with reference to the store you desire to purchase? Is the opportunity to purchase still open?

A. Yes, if soon. Two or three fellows are after it. Of course I am in there now. In compliance with the State Rehabilitation which you referred me to, he came out and inspected the property.

Mr. Pillsbury: Mr. Blek, anything?

Mr. Blek: Two weeks ago Mr. Laird and I were in here and I believe you suggested that he bring his wife and boy up today, and he has brought them today. They have been helping in the store. He has a 14-year old son who can do the heavy lifting.

Mr. Pillsbury: Miss Gleason, anything to present, or any questions?

Miss Gleason: No.

Mr. Weingand: What do you propose to do now, submit this matter to the New York office?

Mr. Pillsbury: First determine the situation in my own mind after receipt of the transcript and studying the medical reports. If I conclude to

(Testimony of Fred F. Laird.)

recommend a lump sum, I will submit the recommendation to the Employees' Compensation Commission in New York. They will have the final voice in the matter.

Mr. Weingand: As I read the provisions, the consent of the defendants is not important.

Mr. Pillsbury: It is not necessary.

Mr. Weingand: And allows a lump sum commutation over the protests of the defendants.

Mr. Pillsbury: Yes. Like any other issue in a compensation case, both sides are entitled to be heard but the consent of neither is necessary for decision.

Mr. Weingand: Nothing further.

Mr. Blek: If I may suggest, the matter of expediting this is important to Mr. Laird because he may not get this particular business. I was wondering if perhaps—you indicated $5,000 the last time—if we agreed to take a smaller sum, not too much smaller, if the insurance companies would consent to it, if that would speed the matter.

Mr. Pillsbury: Applications for lump sum must be approved by the Commission, but consent might have a more favorable effect, counsel.

Q. How much is needed? A. $5,000 cash.

Q. What is the purchase price?

A. About $5,000.

Mr. Blek: It is a fluctuating price for the reason they will have to take an inventory. There is the

(Testimony of Fred F. Laird.)

price set of $2,700 for the fixtures, and the inventory will be at cost.

The Witness: And the stock can be run up or run down.

Mr. Pillsbury: You would pay $2,700 for the fixtures and good will?

Mr. Blek: And the stock would run close to $2,500, but it is my thought that perhaps $4,250 or $4,500 would swing the transaction and the balance could be made on installment payments.

Mr. Laird: I could not carry too large a mortgage on the fixtures.

Mr. Blek: If we could agree to say $4,500 or $4,250 we would agree to that in the event it helped to speed the matter up.

Mr. Weingand: I think in a situation of this kind, particularly when there are two carriers and when subsequently these files will be subject to audit, and particularly with the later medical reports indicating substantial improvement and little, if any, ultimate permanent disability, that neither of the two carriers would be in a position to consent. Of course, if it is awarded, that is another matter. I do not know whether $5,000 is due on a commuted basis.

Mr. Blek: Yes, we figured both cases paid around $2,200.

Mr. Pillsbury: Did that include medical expense?

Mr. Blek: Yes.

Mr. Pillsbury: The medical expense would not

(Testimony of Fred F. Laird.)

be included in the amount of compensation. The liability is for $7,500 for disability, with no maximum on the medical.

Mr. Blek: Maybe it was $2,200 compensation in addition to the medical.

Mr. Weingand: We excluded medical.

Mr. Laird: Did you get the report from Mr. Smith of the State Rehabilitation? You asked me to have him examine the place and I did.

Mr. Pillsbury: There is in the file a report from the Department of Education, Bureau of Vocational Rehabilitation, dated September 27, 1943, from the Training Officer, with reference to the proposed purchase. It describes rather fully the nature of the store, but does not give any very positive recommendation either way. The report will be received in evidence as Exhibit C.

Mrs. Laird, will you come up here, please.

MRS. FRED H. LAIRD

testified as follows:

Q. (By Mr. Pillsbury): You are the wife of the claimant here? A. Yes.

Q. What do you think about this grocery store proposition? Do you think your husband and son and yourself can make a success of it?

A. I think we can make a good go of it. My son and I would have to do the heavy work as far as lifting or any heavy work, because Fred is not able to do that.

(Testimony of Mrs. Fred H. Laird.)

Q. Who would do the head work?

A. My son.

Q. I was asking about the head work.

A. My husband.

Q. Have you had any experience in grocery stores? A. Yes, I have.

Q. How much experience have you had?

A. I have worked there for three years.

Q. What kind of store?

A. Market and grocery store.

Q. And have you had anything to do with the financial end?

A. No, not exactly. I have to collect the points and check out the groceries. I have signed for loads as they have come in and checked them, and outside of that, that is all.

Q. You have not had much chance to study the question of how to make a profit?

A. I have in the vegetable line. I know you have to watch to make money.

Q. How old is the boy? A. 14.

Q. And he is quite active? He looks active.

Q. (By Mr. Weingand): What do you plan to do when the youngster is in school?

A. Well, he could work after school and on Saturdays, and you do not have a load come in every day.

Mr. Weingand: That is all.

Mr. Pillsbury: Does anyone else have any questions? I think that is all. Thank you.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on October 18, 1943.

/s/ HELEN SCHULKE,
Reporter.

EXHIBIT A

Lawrence Chaffin, M.D.
609 Medical Office Building
1136 West Sixth Street
Los Angeles

September 30, 1943.

U S Fidelity & Guaranty Co
111 W 7th St
Los Angeles, California

Dear Sirs:

Re: Your File # 55-C-14693 Pacific Bridge Co Fred F Laird Date of injury: Dec 2 '41 & Jan 13 '42.

As you requested I re-examined the above named patient at my office September 27 1943 and herewith follows my report. Patient was last examined by me July 13 1943. He was first seen at this office August 25 1942, report of this examination is already contained in your files

Weight 151#. Temperature 99.2 pulse 88 respirations 20. Blood pressure 110/64.

Exhibit A—(Continued)

Patient has continued to be actively up and about since his release from the Santa Fe Hospital March 18 1943. August 30 1943 he began work in a grocery store being assisted by his wife and son and he intends to learn this trade. He plans to buy the grocery business if present plans materialize. He believes he can do this work in a grocery store satisfactorily "as long as I am my own boss" Patient states when he gets fatigued he can rest and he is not required to do heavy lifting. He acts in the capacity of manager. He does not wish further surgery at this time.

Present complaints may be summarized as follows: Spine: Weakness thru mid lower back, with pain on bending forward, prolonged standing or heavy lifting. Pain does not extend into either hip, or down either leg. Head: After standing of more than an hour or so he complains of some headache which is pounding in character, and at time radiating upward into the right side of the head to the right forehead.

Sleep is disturbed. Patient is awakened two to three times during the night but on change of position he goes back to sleep. There is no apparent cause for his being awakened. Occasionally when lying on the back sleeping he will awaken, and the lower back and posterior legs feel numb. This numbness disappears on change of position. He believes on the whole he gets his usual amount of sleep.

Patient states that since he began work in the

Exhibit A—(Continued)

grocery store on August 30 1943 "my nerves have been better. His appetite is good. He believes the condition of his back has not changed since he was last examined in this office on 7-15-43.

Examination—Examination was made with all clothing removed. Patient is a young man who appears to be in good general health. He moves about the examining room without evidence of pain or discomfort.

Skin—Clear

M M—Good color

Eyes including Pupils—Normal

Ears, Nose—Negative. Hearing is normal

Teeth—In fair condition

Throat—Generally red, probably from smoking. Tonsils in and small

Neck—The supraclavicular and posterior cervical lymph nodes are all palpable but not definitely enlarged and not tender. The axillary lymph glands are not definitely enlarged.

Chest—Symmetrical with equal expansion

Heart, lungs—Negative.

Abdomen—Negative. The left inguinal lymph glands are large, firm and moderately tender. There are no areas of infection in the left leg to explain this enlargement.

Genitals—Negative

Rectal—Negative. The prostate is not enlarged.

Arms—Normal

Exhibit A—(Continued)

Legs—Joint motions normal.
Length of legs, 34¼/34½ thighs 18/18 calves 12½/12½.
Skin sensation normal.

Reflexes—All are normal. Both knee jerks equal & active; ankle jerks equal & active
No clonus, no Babinski

Spine—Well healed 5½ inch transverse semilunar operative scar over the lumbo-sacral junction. The weakness of which patient complains is said to be generalized in the lower lumbo-sacral region. No abnormal bony points are felt. There is generalized moderate tenderness region of the operative scar. The lumbar muscles are well relaxed. There is some flattening of the lumbar spine

Motions—In forward bending the finger tips fail to touch the floor by 14 inches with subjective complaint of pulling weakness at the lumbosacral junction Backward bending 25% limited
Right & left lateral bendings 25% limited; rotation right and left about 25% limited
Extremes of all motion are said to cause weak sensation in the lower back.

X-Ray—8-24-42 Dr. Karshner made the following report: Roentgen examination including antero-posterior stereo and lateral projections of the lower dorsal, lumbar and lumbo-sacral spine reveals no evidence of fracture, dislocation or

Exhibit A—(Continued)

other injury to any bone or joint. There is no gross anomaly. There is evidence of hypertrophic arthritis manifested by slight sharpening of vertebral margins. There is increased density over the articulations between the fifth lumbar vertebra and the sacrum indicating a hypertrophic arthritic process. There is hypertrophic bony deposit about the margins of the upper portion of the right sacroiliac joint. The arthritis is of origin prior to the alleged injuries of 12-2-41 and 1-13-42

The space between the 4th & 5th lumbar vertebrae is clear. I cannot demonstrate defect in either lamina of either the 4th or 5th lumbar vertebra. In lateral projection I get the impression that the tip of the spinous process of the 5th lumbar vertebra may have been whittled off a bit; in anteroposterior projection there is a rectangular bony shadow approximately one centimeter in its greater diameter between the spinous process of the 5th lumbar vertebra and the spinous process of the first sacral segment. I cannot say that it is connected by bony union to either vertebra."

January 29 1943 the following report was made by Dr. Karshner: Roentgen examination of the lower dorsal, lumbar and lumbo-sacral spine shows no material change from the films of 8-24-42. I cannot demonstrate fusion of any of the lumbar vertebrae or of the fifth lumbar vertebra to the sacrum."

Exhibit A—(Continued)

Discussion—As a result of this and previous examinations, and my observation of this patient since February 15 1943, I believe he is now well able to do the light type of work at which he is now employed in a grocery store. This I believe will be his most beneficial type of treatment. I believe with further time and use there may be increase in strength of the low back. I believe he cannot do the work of a carpenter at this time, and cannot state when this type of work may be done. There will probably be a small amount of permanent weakness in the lower back, with a small amount of restricted low back motions.

I believe there is no further treatment indicated beyond time and use.

Very truly yours,

/s/ LAWRENCE CHAFFIN, M.D.

LC-J

[Stamped]: Received, Oct., 1943, Claim Dept., Los Angeles Office.

EXHIBIT B

Carl W. Rand, M.D.
1023-4 Pacific Mutual Bldg.
Los Angeles

October 4, 1943.

Dr. Lawrence Chaffin
1136 West Sixth Street
Los Angeles, California

My dear Doctor Chaffin:

Re: Mr. Fred Laird, Emp: Pacific Bridge Building Ins: United States Fidelity & Guaranty

Pursuant to your request the above named injured was re-examined at my office this date, having last been seen on February 24, 1943.

His general condition is better than was the case at that time. He states that he no longer has pain in the right sciatic distribution. If he does not get over-tired his back is comfortable, otherwise he has low back pain. He has to be careful about heavy lifting. He has been working in a grocery store for the past five weeks.

His general physical condition is good. His wound is well healed. He leans forward until the finger tips come within 4″ of the floor. Backward and sideward bending are moderately limited. There is only moderate spasm of the lumbar muscles. His gait is normal. Straight leg lifting can be carried out on each side to 90°. Lasegue's sign is negative right and left. Circumference of each

Exhibit B—(Continued)

calf is 32.5 cm. No objective sensory disturbances are made out. The knee jerks are present on reinforcement only; they seem equal. Neither tendon Achilles jerk is present. There are no abnormal reflexes of the Babinski group. No ankle clonus right or left.

In my opinion his condition is considerably better than was the case on February 24, 1943, and no further operations are indicated.

Thanking you, I am

Very sincerely yours,

/s/ CARL W. RAND.

CWR/A

[Stamped]: Received, Oct., 1943, Claim Dept., Los Angeles Office.

EXHIBIT C

State of California
Department of Education
Bureau of Vocational Rehabilitation
Los Angeles 13, California

September 27, 1943.

Mr. Warren H. Pillsbury
Deputy Commissioner
United States Employees'
Compensation Commission
Room 318-417 Market Street
San Francisco 5, California

Re: Fred Laird, DB-P.

Dear Mr. Pillsbury:

Mr. Laird informed us that you had recently suggested that he ask us to investigate the food market which he wants to purchase if his insurance is commuted, and to report our findings to you.

We have seen the business and looked over the books and have acquired considerable factual data. Since you are probably primarily interested in the feasibility of commuting Mr. Laird's benefits for the purchase of this business we will orient our remarks in this direction.

The food market consists of grocery, wine and beer, vegetable, and meat departments located at 1060 East Hyde Park Boulevard, Inglewood, California. It is owned by Frank Fleishacker and does business under the name, "Fairview Market."

Exhibit C—(Continued)

Mr. Fleishacker opened this market about 1924 and operated it until about 1940 when he sold it. The purchaser failed in May 1943 due to poor management, according to Mr. Fleishacker. The latter remodeled and reopened it on July 2, 1943.

Since the present owner has been operating it continuously for so short a time, and since current purchasing and selling conditions are a typical, it is difficult to draw any reliable comparisons and conclusions from the books. However, herewith are some items from the books which may be used for what they are worth. (Items followed by an asterisk indicate that information is based upon a document of original entry such as a duplicate sales tax return, wholesaler's statement, etc.). Incidently, these books are not regular double-entry books and are not too well organized.

Gross Sales

	1943	
	July	August
Groceries		
	———	———
Wine and beer	$3358.16	$3350.22*
Vegetables		
Meats	$1346.—	1593.—

Purchases

Meats	$ 969.03	$ 997.90

Groceries are purchased from several sources, but mainly form Haas-Baruch Co. Statements from the latter show:

Exhibit C—(Continued)

7/15—31/43	$303.16*
8/ 1—15/43	373.88*
8/15—31/43	355.23*
9/ 1—15/43	600.36*

Meats likewise are purchased from several sources but mainly from Armour Co. Saw statement for week ending 6/26/43 in the amount of $218.—*

If the market has an overall gross sales per month of $4500 to $5000, and if the net profit can be figured at 5% (the figure generally considered correct for this type store), the business is earning $225.00 to $250.00 per month. Employed now are Mr. Fleishacker, Mr. Laird, Mrs. Laird, and the Laird boy, age 14, who works part-time. The store is open about 12 hours per day.

Mr. Fleishacker wants $2600 for his fixtures, which are not old fashioned and include a small walk-in meat refrigerator and a self-service grocery refrigerator, both operated from a single compressor. There is also a large modern double meat and delicatessen refrigerated showcase operated from an independent compressor. Also included in the fixtures are: a meat grinder, 2 scales, an adding cash register, shelving and display islands, etc. It is difficult to evaluate these because of current conditions, but the overall price asked probably includes some goodwill.

The merchandise is to be transferred on an inventory based on current wholesale value. Mr. Fleishacker thinks is will come to about $2500 but

Exhibit C—(Continued)

thinks also that it may be as low as $1700. He is willing to loan Mr. Laird $500 on the fixtures, if necessary.

The rent asked is $60.00 per month. A lease for any length of time can be had. Payment in advance of the last month's rent is not required. The building belongs to Mr. Fleishacker. He is willing to pay Mr. Laird $30 per month for the meat department and to operate it until Mr. Laird can hire a butcher or learn to do it himself.

It is claimed that the business is on a strictly cash and carry basis with all merchandise delivered to the store by the wholesalers. Mr. Laird has met the various salesmen and is convinced that they will continue to provide him with scarce merchandise on the same basis as at present.

Some of the pitfalls of business were discussed with Mr. Laird. It was pointed out that he lacks experience or training in business—particularly in meat cutting and the other types carried on in this market. The difficulty of securing a qualified employee for the meat department was pointed out. His inability to lift or stay on his feet much was also discussed. Mentioned also was the relatively small percentage of profit in view of the investment, of money and labor required. However, Mr. Laird has apparently thought of all of these factors and thinks he can cope with them, with the aid of his family, as they arise. There is the pos-

Exhibit A—(Continued)

sibility that his determination might enable him to make a vocational adjustment through this business.

Very truly yours,

/s/ ARTHUR RASHKOW,
Training Officer.

AR/dg

EXHIBIT A

Lawrence Chaffin, M.D.
1138 West Sixth Street
Los Angeles

Setpember 30, 1943.

U. S. Fidelity & Guaranty Co.
111 W. 7th St.
Los Angeles, California

Dear Sirs:

Re: Your file # 55-C-14693 Pacific Bridge Co. Fred F. Laird. Date of injury: Dec 2 '41 & Jan 13 '42

Discussion—

As a result of this and previous examinations, and my observation of the patient since February 15, 1943, I believe he is now well able to do the light type of work at which he is now employed in a grocery store. This I believe will be his most

beneficial type of treatment. I believe with further time and use there may be increase in strength of the low back. I believe he cannot do the work of a carpenter at this time, and cannot state when this type of work may be done. There will probably be a small amount of permanent weakness in the lower back, with a small amount of restricted low back motions.

I believe there is no further treatment indicated beyond time and use.

Very truly yours,
LAWRENCE CHAFFIN, M.D.

EXHIBIT B

Carl W. Rand, M.D.
1023 Pacific Mutual Bldg.
Los Angeles

October 4, 1943.

Dr. Lawrence Chaffin
1136 West Sixth Street
Los Angeles, California

My dear Doctor Chaffin:

Re: Mr. Fred Laird. Emp: Pacific Bridge Building Ins.; United States Fidelity & Guaranty.

Pursuant to your request the above named injured was re-examined at my office this date, having last been seen on February 24, 1943.

His general condition is better than was the case at that time. He states that he no longer has pain

Exhibit B—(Continued)

in the right sciatic distribution. If he does not get over-tired his back is comfortable, otherwise he has low back pain. He has to be careful about heavy lifting. He has been working in a grocery store for the past five weeks.

His general physical condition is good. His wound is well healed. He leans forward until the finger tips come within 4″ of the floor. Backward and sideward bending are moderately limited. There is only moderate spasm of the lumbar muscles. His gait is normal. Straight leg lifting can be carried out on each side to 90°. Lasegue's sign is negative right and left. Circumference of each calf is 32.5 cm. No objective sensory disturbances are made out. The knee jerks are present on reinforcement only; they seem equal. Neither tendon Achilles jerk is present. There are no abnormal reflexes of the Babinski group. No ankle clonus right or left.

In my opinion his considerably better than was the case on February 24, 1943 and no further operations are indicated.

Thanking you, I am

Very sincerely yours,
CARL W. RAND.

Received Oct. 22, 1943, District No. 13.

Filed Sept. 18, 1943.

Copy forwarded to Washington.

Federal Security Agency, Bureau of Employees Compensation, Before Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District.

Case No. DB-P-1-1715

FRED E. LAIRD,

Claimant,

vs.

CONTRACTORS, PACIFIC NAVAL AIR BASES, and BUILDERS PEARL HARBOR DRY DOCK No. 4,

Employers,

LIBERTY MUTUAL INSURANCE COMPANY and U. S. FIDELITY & GUARANTY COMPANY,

Insurance Carriers.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Federal Security Agency, Bureau of Employees Compensation, in the Grand Jury Room, United States Post Office Building, Los Angeles, California, on Monday, the 19th day of August, 1946, at 2:00 o'clock p.m.

Appearances

Claimant present in person, and represented by

John W. Fleming, of the law office of Charles L. Blek, Attorney at Law.

Defendants, Contractors, P.N.A.B., and Liberty Mutual Insurance Company, represented by Claude F. Weingand, Attorney at Law.

Defendants, Builders Pearl Harbor Dry Dock No. 4, and United States Fidelity & Guaranty Company, represented by Virgil L. Brown, Attorney at Law.

Mr. Pillsbury: Claimant present in person, and represented by Mr. John W. Fleming, appearing for Mr. Charles L. Blek, attorney for claimant. Defendants, Contractors, Pacific Naval Air Bases and Liberty Mutual Insurance Company represented by Mr. Claude F. Weingand, Attorney at Law. Defendants, Builders Pearl Harbor Dry Dock No. 4 and U. S. Fidelity and Guaranty Company, represented by Mr. V. L. Brown, Attorney at Law.

In this matter joint compensation orders were entered on November 4, 1942, in favor of claimant, one of them awarding one-half compensation against Contractors, Pacific Naval Air Bases and Liberty Mutual Insurance Company, and the other awarding one-half compensation against Builders Pearl Harbor Dry Dock No. 4, and United States Fidelity & Guaranty Company. Each award was for $12.50 a week, or a total of $25.00 a week from both carriers. The reason for this apportionment appears in the orders.

No proceedings have since been had to modify

said orders other than some matters not now involved, consisting in adjustment of reimbursement for medical expense.

The matter comes on for hearing today upon the petition of Mr. Weingand for the purpose of determining extent of temporary partial disability and the payments due therefore, based upon the assertion that claimant has been earning substantial sums of money as a builder and interior decorator and building contractor. The implication is that disability has become partial instead of total.

Mr. Weingand, do you desire to make a statement?

Mr. Brown: I would like to join in that.

Mr. Pillsbury: Did you wish to make a statement?

Mr. Weingand: Yes. At this time, I wish on behalf of defendant carrier, Liberty Mutual Insurance Company, to raise as an additional issue, or perhaps I should put it this way: to orally petition to terminate disability, supporting my oral petition so to do by a report of examination by Dr. Christopher Mason, M.D., dated August 1, 1946.

I can appreciate that this additional oral petition may come in the nature of a surprise to applicant and to his attorney, and if any point is raised in that regard, I certainly would not insist on proceeding at this time, knowing that the applicant and his counsel should have and are entitled to the statutory ten days' notice.

Mr. Pillsbury: I will give them that time.

Mr. Fleming: I would request additional time for examination by our physician or an impartial physician, and an opportunity to examine the report.

Mr. Weingand: I have a copy for you, counsel.

Mr. Pillsbury: It may be well to open a record on such matters as can be started today, and then adjourn to a future date.

Mr. Fleming: Since the report is apparently adverse to claimant's position, I do not believe there is any need to go into it now, but we ask additional time.

Mr. Pillsbury: How about the allegation that claimant has been making a substantial income by his labor for some time past?

Mr. Fleming: That is an issue to be determined at this hearing.

Mr. Pillsbury: The other issue is as to whether his physical impairment has terminated.

Mr. Fleming: Yes. I think the issue whether he is able to earn a substantial amount as a contractor is to be determined at this time, and the other issue would be based upon the medical.

Mr. Pillsbury: Mr. Laird——

Mr. Fleming: We would like to request attorney's fees for our appearance today on behalf of the applicant.

Mr. Pillsbury: Very well. That will be acted on when the decision is entered.

FRED E. LAIRD

claimant, having been previously sworn, testified as follows:

By Mr. Pillsbury:

Q. Mr. Laird, are you fully recovered and able to earn the same wages you were before your accident? A. No, sir.

Q. Has there been any change in your physical condition since the last decision in your case?

A. It is some better, due to the limited amount of things I do. I watch myself and do not do things I know will hurt me.

Q. Have you been able to earn a fair living in the last year or two?

A. Not actually. I have a couple of workers working for me. I did manage to go out and take a few paint jobs. I figured the jobs.

Q. Can you estimate your earnings from your wages in the last six months?

A. In the last six months I have had scarcely any income.

Q. Why not?

A. I have been tinkering with a building. My boy and I have been playing with it. I have recently sold it; it is still in escrow.

Q. You worked on your own building there, did you? A. That is right.

Q. Before that what income did you have?

A. The Four Square Gospel as a supervisor, building this church.

(Testimony of Fred E. Laird.)

Q. How much did you make a week on that work?

A. The deal was I would hire the men. I financed it. And they allowed me $1.50 an hour for each man. If I paid the men $1.25 an hour, I made the difference, plus $1.50 to me.

Q. How much a week did you earn on that job?

A. Doing that job I would—there were no records kept. I would say $75.00.

Q. $75.00 a week? A. Yes.

Q. What did you do before that?

A. I was just tinkering around, taking a paint job and having men to do the painting.

Q. What was your average weekly income from that activity?

A. It would vary—that was nearly two years ago.

Q. How much do you think you netted a week before the Four Square Gospel job?

A. I don't suppose $20.00 a week—only now and then.

Q. How much do you think you are reasonably able to earn right now?

A. I have just acquired a fruit and vegetable and frozen food market. My family and I run it and it is running 60 to 70 a day, on Saturday one hundred.

Q. How much do you attribute to your labor?

A. Very little of it. The man delivers the vegetables, handles the bulkage, handles the lifting, and

(Testimony of Fred E. Laird.)

my wife and my little boy and my older son do most of it. Ten per cent is possibly mine.

Q. You think then you are earning about $6.00 a day yourself?

A. Hardly that, I don't believe.

Mr. Pillsbury: Report just submitted of Dr. Christopher Mason dated August 1, 1946, received in evidence as Exhibit A.

Does either side desire to ask any further questions?

Mr. Weingand: Yes. Does your file show that the original award is dated November 5, 1942?

Mr. Pillsbury: November 4, 1942.

Q. (By Mr. Weingand): Mr. Laird, Mr. Pillsbury has just told us that the award he made in your favor is dated November 5, 1942——

Mr. Pillsbury: November 4.

Q. (By Mr. Weingand): That is right, November 4, 1942. Under the terms of that award you were entitled to and have been receiving from the two different insurance companies $25.00 a week. At the time of the last hearing, just before the award came out, you testified that you had done no work following the surgery which Dr. Taylor had performed on your back. A. Yes.

Q. This may be somewhat tedious to you, but I am interested in knowing what you have earned since the date of that award, November 4, 1942. I will ask this first question: Who did you first work for after that date?

(Testimony of Fred E. Laird.)

A. I really do not know.

Mr. Pillsbury: Just a minute. I think I should shorten your examination, Mr. Weingand, in this way: I have just had some correspondence from the Chief Counsel of the Bureau implying that a change in compensation rate should not be retroactive, particularly for a long period of time. Your petition for modification is dated July 17, 1946. I think the question is, therefore, what earning capacity does he have and did he have since about July 17, 1946. In view of the indefiniteness of recent employments it is possible to go back to some extent over his experience in order to ascertain his present capacity, but I think it is not necessary to establish actual earnings for periods several years ago.

Mr. Weingand: Well, Mr. Pillsbury, let us assume, taking a hypothetical case—let us assume this man since the date of this decision had been earning at various employments sums in excess of his wages at the time of injury. You do not mean to say the Chief Counsel would bar me from showing that and seeking a credit for the overpayment?

Mr. Pillsbury: I think he would hold it is incumbent upon the insurance company to bring up a question of change promptly and not attempt to secure a retroactive credit.

Mr. Weingand: How could the applicant be harmed by the date upon which the investigation is initiated? It is the fact of earnings which is material.

(Testimony of Fred E. Laird.)

Mr. Pillsbury: The proposition came up over the question of whether in changing the compensation rate now I should give credit for an overpayment for several years in the past, assuming such overpayment to have resulted, if the order changing the rate were made retroactive.

Mr. Weingand: Certainly that could not harm the applicant.

Mr. Pillsbury: If he is entitled to more compensation at a lower rate, and by reason of overpayment of several thousand dollars, compensation could not be required to be paid to him for a year or two, he would be harmed.

Mr. Weingand: Compensation is reimbursement for impaired earnings.

Mr. Pillsbury: But to have a gap for a year or two in the future while overpayment is caught up would harm him.

Mr. Weingand: I bow to the opinion of your Chief Counsel.

Mr. Pillsbury: You can try it out in the courts.

Mr. Weingand: Yes. The reports in my file reveal this man had substantial earnings. He worked as a chauffeur for Norma Shearer; he worked in a machine shop for four months; he was in the painting and contracting business.

Mr. Pillsbury: I will still take the position that inquiry is not possible except in so far as it may throw reasonable light on his earning capacity at the present time and since the date of your application.

(Testimony of Fred E. Laird.)

Mr. Weingand: I am at a loss to understand the position you take. Obviously the information which has been accumulated and which supports the petition must have covered a period prior to the date upon which the petition for the adjustment of compensation was made.

Mr. Pillsbury: Try to make your inquiry more brief, as to earlier and more remote years.

Mr. Weingand: I cannot conceive there is any difference in which year the earnings were, whether three years ago or within the last two weeks. Is this an arbitrary line?

Mr. Pillsbury: Proceeding with the proposition that your application for modification should take effect as of the date you made application.

Mr. Weingand: It is the earnings he has had that will support my request for a modification. If we have overpaid I consider we are entitled to a credit on payments we may have made.

Mr. Pillsbury: Further discussion outside the record.

(Discussion off the record.)

Mr. Pillsbury: Mr. Weingand, I will at this time invite you to make an offer of proof, indicating what you desire to establish by the line of questioning you were starting on.

Mr. Weingand: I might state, before I make the offer of proof requested, that much of my questioning of the applicant is of necessity in the nature of

(Testimony of Fred E. Laird.)

cross-examination. I have had served on the applicant a subpoena duces tecum to produce his records of income earned and I have not as yet had an opportunity to ask whether he has responded to that subpoena duces tecum. If he has and has the records, Mr. Brown and myself would like a reasonable opportunity, by a short continuance, to examine those records. The information which I have may in some instances be hearsay. It can promptly be supported or denied, shown to be false by testimony given by this applicant under oath.

Mr. Pillsbury: Tell me what you expect to prove.

Mr. Weingand: I expect to show from the date of the award in this case, November 4, 1942, that this claimant has had a substantial income for long periods of time, and that because of the income which he has since that date received the defendant insurance carriers are by law entitled to a credit for any overpayment of temporary partial indemnity made during that period of time.

It is the position of the defendant carriers that they and each of them are as a matter of law entitled to inquire into the claimant's actual earnings from all sources from the date upon which the decision was rendered, November 4, 1942, and I believe the decision itself calls for payment—I think I have that decision right here—before I make any comment with reference to the decision itself, I might—that would be argument, which I will reserve for the conclusion of the proceeding.

(Testimony of Fred E. Laird.)

It is the position of the defendants there is no law or decision which limits the period of time during which the defendants are entitled to inquire into earnings subsequent to the date of injury.

It is the defendants' position that they are entitled to any credit for overpayment if it is established that the claimant has had substantial earnings, by the same token that the applicant would be entitled to a further payment if compensation was erroneously figured in the matter. And that is my offer of proof on behalf of the two defendant carriers.

Mr. Pillsbury: Have you had a subpoena served on you and have you produced here your records to show what you have earned?

Mr. Fleming: Yes. The subpoena was served and the records are here.

Mr. Pillsbury: A summary of the income as shown by these records may be filed with me subsequently, to supplement the offer of proof, subject to the possibility that I might change my position on re-reading the conclusions of the Chief Counsel referred to, in case I have incorrectly recalled them.

At this time I will provisionally deny the request for opportunity to prove past earnings at a period remote to the issue of present earning capacity, and I will also take the position that defendants are not entitled at this time to seek a credit for any past overpayments which might otherwise be established for several years.

(Testimony of Fred E. Laird.)

The question remains open as to Mr. Laird's present earning capacity. Capacity differs from actual earnings, but actual earnings in a period not remote to the present time may be shown as having a bearing upon earning capacity at the present time.

(Discussion off the record.)

Mr. Fleming: I would like the record to show that we will object to the introduction of any evidence, or any questions based upon the documents produced here as a result of the subpoena duces tecum, on the ground that any evidence prior to or close to or earlier than the petition for modification is irrelevant to the issues of this hearing—more or less corroborating your position, Mr. Commissioner, for whatever it is worth.

Mr. Pillsbury: Objection sustained.

(A short recess was taken.)

Mr. Pillsbury: After discussion, it appears that subject to the legal defenses and positions, the parties have agreed upon the following factual matter which I will now read into the record as evidence, for whatever it may be worth. This supersedes my position declining to receive such matters other than in an offer of proof. It does not supersede my statement of my understanding of the rules of law which are applicable, but is intended to simplify the record.

It is stipulated that for the year 1942 claimant

(Testimony of Fred E. Laird.)
did not file any income tax statement showing his earnings.

For the year 1943 he filed an income tax statement showing his earnings were $596.50 in that year.

For the year 1944 he filed an income tax return showing that he earned $1,363.31 for the year.

For the year 1945 he filed an income tax return showing that he earned in that year $1,246.00.

For the year 1946 no return has been filed.

It is agreed he engaged in a certain real estate transaction, in which he assisted in the building of several units of residential property on land owned by him, which he has now sold. The sale price for the entire property was $22,500. The original cost to him for the land and improvements when he bought them was $3,500. During the time he owned the land he helped to construct three unit flats and garages. Any other buildings?

The Claimant: No.

Mr. Pillsbury: Mr. Weingand, you may proceed.

Q. (By Mr. Weingand): Mr. Laird, have you been sworn, or does his oath carry over from 1942?

Mr. Pillsbury: It will carry over from the earlier year.

Q. (By Mr. Weingand): You are under oath now, Mr. Laird, if you please. I am referring to your earnings for the years 1943, 1944 and 1945. Except as they have been placed in the record by Commissioner Pillsbury, did you have any earnings from any other source during those three years?

(Testimony of Fred E. Laird.)

A. No.

Q. Did you receive any money for work performed from any person, firm or corporation during those three years? A. No.

Q. Now, getting to 1946, Mr. Laird, about how many hours time did you personally devote to the erection or construction of these three apartments with garages attached on your property?

A. You mean manual labor?

Q. Manual labor first. A. Not very much.

Q. How much?

A. I couldn't tell. I don't have the least idea. I would work two or three hours at a time and I would sit down and rest.

Mr. Pillsbury: Did other people work on the house with you?

A. Yes.

Q. How many?

A. My oldest son with the framework, and Mr. Bud Kennedy to help with the roof with my son, and the rest was sub-contracted, electric, plaster, and so on.

Q. (By Mr. Weingand): How many hours did you devote to, let us say the foundation?

Mr. Pillsbury: Mr. Weingand, first, I am not a good prophet, but I am not able to see how you can extract from this situation any information to show how much his time was worth. The difference between the buying and selling price, and increase in real estate values, and the question of profit on con-

(Testimony of Fred E. Laird.)
tracts, and the value of the labor of others, attach to any figure for his own wages.

Mr. Weingand: I am forgetting about the sale. I am assuming in my own mind that Mr. Laird worked.

Mr. Pillsbury: Could you work eight hours a day?

A. No.

Q. (By Mr. Weingand): About how many hours did you put in on the foundation?

A. I hired it done.

Q. How about the cement or concrete floors?

A. No.

Q. Is the building constructed of wood?

A. It is frame, yes.

Q. How many hours did you devote to the erection of the frame work?

A. Well, that I don't know, I have no records. Just two or three hours at a time, then I would take it easy.

Q. How many times did you work two or three hours? Would you say one hundred hours in all?

A. I have been a year on it.

Q. Would you say one hundred hours?

A. I really don't know. It is very difficult to answer that.

Q. They were constructing the building, I take it, six days a week?

A. Oh, no. We worked a few days and then be gone a while.

(Testimony of Fred E. Laird.)

Q. When did you start construction?

A. About last September.

Mr. Pillsbury: Mr. Weingand, I think your principal difficulty now is in trying to establish earning capacity by cross-examination of claimant instead of bringing witnesses to express opinions as to how much a 25 per cent disabled man would be able to earn as a contractor in the open market. I get my 25 per cent from Exhibit A, Dr. Mason's report, in which he expresses the opinion the patient is not more than 25 per cent disabled.

Mr. Weingand: One certain way to establish the earning capacity is to find out how much the man actually earned and doing what, and the man is able to testify as to what the reasonable value of the services of a person erecting frame work or roof or decorating is per hour or per week.

Mr. Pillsbury: Are you satisfied to rely on his estimate?

Mr. Weingand: I think he will be fair. He is under oath.

A. I don't know. It is just a hit and miss affair.

Q. (By Mr. Weingand): You must have some opinion. I know you kept no record, but what is your best estimate? Understand it will be considered only as an estimate.

Mr. Pillsbury: Of the number of hours he worked on the house?

Mr. Weingand: Yes.

A. Well, let's see. My estimate of the number

(Testimony of Fred E. Laird.)
of hours I put in during this last year on that house would be a hit and miss estimate, and I would not say I have put in over 100 hours myself.

Mr. Pillsbury: Over a six months period?

A. Almost a year. I think that would be putting it strong.

Q. (By Mr. Weingand): Why didn't you put in more? A. Because I couldn't.

Mr. Pillsbury: Why not?

A. I would only work a few hours, an hour or two hours, and then I would have to sit down.

Q. Why?

A. My back gives out on me, weak.

Q. (By Mr. Weingand): That was from September of last year until the present time?

A. About a month less than a year.

Q. Is your back worse than it was in September of last year? A. No.

Q. Better? A. No.

Q. About the same? A. Same.

Q. You worked for Mrs. Bigelow and repaired her house in 1945?

A. I didn't do the work myself. Mr. Kennedy did the manual work. I instructed him.

Q. Mr. Kennedy did the heavy work?

A. Yes, and my son on the apartment.

Q. Did you do any painting?

A. My son did.

Q. Any cabinet work?

(Testimony of Fred E. Laird.)

A. I tinkered around with that. That was my biggest part of the job.

Mr. Pillsbury: Are you able to do the work of a contractor, figuring, estimating and ordering?

A. Some; up to a certain extent. Not into large construction?

Q. But for residential work?

A. Some of them, yes.

Q. (By Mr. Weingand): When did you buy this little vegetable stand?

A. The first day of August.

Q. This year? A. Yes.

Mr. Pillsbury: What are you doing there now?

A. I am just helping my wife and family, manage the business, taking care of the buying.

Q. (By Mr. Weingand): I believe you told Mr. Pillsbury that you figured that you were actually earning about $8.00 a day?

A. No. He asked if I were and I said I did not think so. I have no figures on the market. It is going around $50 or $60 a day, but I have just audited it and I haven't averaged it up yet.

Q. Who is actually there?

A. My wife, one small son, my large son is there every morning, and myself. I am in and out.

Q. Your small son?

A. Billy Eugene Laird.

Q. How old is he?

A. Eleven, will be 12 the 30th of September.

Q. The other is your stepson?

(Testimony of Fred E. Laird.)

A. Stepson.

Q. How old is he?

A. Born 1929. He will be 17.

Q. Is he in school?

A. He is married and still going to school. He helps me with everything, and lives with us.

Q. So when the son and stepson are in school you and your wife run the place?

A. We intend to do so.

Q. That is fresh vegetables?

A. Fresh vegetables, fresh fruit, and frozen food.

Q. Where is it located?

A. 10802 Hawthorne Avenue.

Q. What are your present complaints with reference to your injured back?

A. I just have spells every once in a while and I have to stay in bed for four or five days until I get over it.

Q. Why can't you get up?

A. Dr. Taylor told me the sciatic nerve becomes pinched or swollen, and if I bump myself——

Q. If an operation were offered to you by the defendant insurance companies for the cure and relief of your present complaints, would you accept it?

A. Yes, if they can show me where they can do any better.

Q. Would you accept it if they could not assure you?

A. That I have gone through with Dr. Chaffin.

(Testimony of Fred E. Laird.)

Q. Would you accept, yes or no?

A. No.

Q. That is, you would not take the operation unless they guaranteed the outcome?

A. No; they give me a reasonable assurance.

Mr. Pillsbury: A man is not obligated to take an operation unless there is ground to believe he will be substantially improved by it.

Mr. Weingand: I was noticing the report of Dr. Mason, in the last paragraph—the next to the last paragraph, "The question of possible further therapy was discussed with the patient and he stated that he doesn't want anything whatsoever done."

Mr. Pillsbury: Does your medical advice lead you to believe a fusion operation will help him, and are you offering it?

Mr. Weingand: I am not offering it, but I am interested in knowing what the applicant's attitude would be if offered.

Mr. Pillsbury: I am not interested in any operation unless defendants offer evidence to show it will reasonably improve the condition.

Mr. Weingand: I am not offering any operation at this time.

Mr. Pillsbury: All right.

Q. (By Mr. Weingand): And you say Dr. Taylor tells you he thinks it is the sciatic nerve that gets pinched. Does it pain you?

A. When I bump myself it feels like electricity going down my leg.

(Testimony of Fred E. Laird.)

Q. Your back?

A. My hip. Sometimes it comes on—I don't know how it comes on.

Q. How long does this pain last?

A. It varies from four to eight days.

Mr. Weingand: I have no other questions.

Mr. Pillsbury: Mr. Brown, anything?

Mr. Weingand: One more question: What do you believe, Mr. Laird, would be the reasonable value of the services of a person who worked as you worked on this house of yours from September until the present time? A. $100.00.

Mr. Fleming: I will object, no foundation has been laid which would establish Mr. Laird as an expert.

Mr. Pillsbury: Objection overruled; if Mr. Weingand wants to rely on his opinion, I am willing to take it.

Mr. Weingand: His opinion is better than no opinion. I am sure he would be honest. He has had building experience in a supervisory capacity.

A. $150.00; $1.50 an hour.

Mr. Pillsbury: $150.00 per month?

A. $1.50 per hour for 100 hours.

Q. How much a week do you think such a person can reasonably earn in the open labor market?

A. In the condition I am in?

Q. Yes.

A. Very little, because they would not have him.

Q. (By Mr. Weingand): How much?

(Testimony of Fred E. Laird.)

Mr. Fleming: I object again on the ground there is no indication he could work 40 hours over a period of time.

Mr. Pillsbury: However, I think Mr. Weingand has his answer.

Mr. Weingand: You don't have your answer.

Mr. Pillsbury: I have sufficient for my purposes.

Mr. Weingand: Mr. Pillsbury's question was how much per week.

Mr. Pillsbury: Can you give me any more definite amount?

A. About $15.00 a week.

Q. About $15.00 a week? A. Yes.

Mr. Weingand: I have no further questions.

Q. (By Mr. Brown): Have you made any attempt to find any other kind of work, other than this food stand you are running?

A. Yes. I tried at the Koehler Furniture Company and they asked where I had been and I had to give references and that led to the subject of my condition and they said, "We don't want you." So several times I have inquired around and received the same answer. I have been told by the other employees of the Kaiser Homes they would give a rigid examination when they are employing.

Q. How long is it since you had medical attention? A. I was examined about a month ago.

Q. By whom? A. Dr. Friedenfeld.

Q. Why were you examined?

A. This spell again.

(Testimony of Fred E. Laird.)

Q. Is that the only time you have been examined, other than examination by the Commission's doctor?

A. Oh, no. I have had Dr. Chaffin, Dr. Taylor constantly.

Mr. Pillsbury: The defendants are the moving parties and if they have any further medical reports to offer I will receive them. It is not worth while asking about what examinations claimant has had in the absence of submission of medical evidence by defendants with reference to them.

Mr. Weingand: At the beginning of the hearing, I raised orally the additional item of my petition for termination of disability. In support of that oral petition, which is now a part of the record, I have offered the report of Dr. Mason. We have interrogated the claimant with reference to his condition, and at this time I wish on behalf of the defendant to authorize the appointment of an individual medical examiner, or examiners, to examine this claimant at the expense of the defendant carriers, and render his report. If your examiner is of the opinion he needs a consultant, he may have it at our expense; if laboratory tests or further x-rays are needed, again they may be had at our expense.

Mr. Pillsbury: Upon the present state of the record I think it is not necessary, and the matter is now submitted for decision.

On the medical showing of a change in condition, defendants have offered the report of Dr. Mason, which concludes with the statement, "it is my im-

(Testimony of Fred E. Laird.)

pression that this patient is not more than 25% disabled at this time."

In view of the presumption of the continuance of the condition found in the original compensation order until changed, and that this is the only evidence to show change, I am of the opinion that the evidence fails to show any such substantial improvement as would militate against the claimant being substantially disabled at this time. There is still substantial disability, though partial in character.

With reference to whether his wage earning capacity has now improved to a point sufficient to justify any reduction from the sum of $25.00 a week, I am of the opinion no evidence has been submitted by defendants to establish a present wage earning capacity which is within $37.50 a week of the earning capacity at the time of injury. As to what a man can earn in the open labor market, who is up to 25 per cent disabled and cannot do physical work 40 hours a week, I am unable to say from the evidence that such man is shown to be able to earn within $37.50 of the wages at time of injury. The loss of wage earning capacity is still apparently more than that sum.

The petition for reduction or termination of liability is therefore denied without prejudice.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken

in the above matter at the hearing held on August 19, 1946.

/s/ HELEN G. SCHULKE,
Reporter.

EXHIBIT A

[Letterhead]
Christopher Mason, M.D.
2965 Wilshire Boulevard

August 1, 1946

Liberty Mutual Insurance Co.
714 South Hill St.
Los Angeles 14, California.

Re: Fred Laird, Emp: Pacific Naval Air Base, Injured: December 2, 1941, February 13, 1942.

Attention: Miss McDonald.

Gentlemen:

Mr. Laird reported to this office today relative to two separate injuries the first one he blames for his trouble mainly, on December 2, 1941 at which time while working on Johnson Island in the Pacific he lifted a crane and felt a sudden pain in the right low back region running down in the back of the right thigh. He states that he had very little medical attention and was immediately shipped to Pearl Harbor, and at the time of the disaster of December 7th began work as a construction foreman although he was hardly able to get around, and continued this

Exhibit A—(Continued)

until February 13th at which time he slipped on some oil and exacerbated the same condition he was already suffering with to a point where he could no longer do anything and was shipped home to the mainland.

Subsequently, he states, that he was operated on by Dr. G. Mosser Taylor July 9, 1942 for a herniated right lumbosacral disk, and limped around for about a year after that before he could walk with any degree of ability. Since that time, he states that he has done nothing but some chauffering and buying real estate and property, fixing it up and selling it. Recently he states that he has bought some kind of a vegetable stand and his wife is running it, and that he runs the business end of it and looks after the books, and things like that.

His complaints are today that he can't do any work, because if he turns or twists in a certain way he will get a spell of pain which will cause him to be disabled totally for three or four days and he has to use a heat lamp on it. He states that these spells may happen once a month or something like that. He says that he has been examined by many doctors, has been in the Santa Fe Hospital but nothing has been done since the surgery by Doctor Taylor, whom he last saw two years ago.

Examination—Today reveals a well developed, well nourished adult male with fair musculature, standing erect with no list to either side. On forward bending the patient reaches to within 10 inches

Exhibit A—(Continued)

of the floor, on backward bending the patient refuses to move his back at all, bending his neck backward only, stating that pain at the lumbosacral joint is the reason why he cannot go back any further. Left and right bending are 35°—the patient complaining that it hurts more on going to the left. Examining the local area, there is a transverse incision approximately 5 inches long at the lumbosacral joint. The musculature palpated beneath the skin feels normal—no muscle spasm. The only place that the patient complains is on direct palpation of the middle of the scar, he jumps no matter how hard or how deep the palpation, or how light, or how easy. Lower extremities: Calf measurement: 13 and 3/8 over 13 and 3/8; patient denies all paresthesias, hypesthesias or anesthesias in the lower extremities. He states that he did have some prior to the surgery and for some time afterwards in the lateral aspect of the right calf.

Due to the fact that the patient had not been x-rayed for over a year, x-rays of the lumbosacral joint were made and revealed a slightly narrowed disk space and on the lateral view it is seen that the sacral portion of the bone is built up so that it almost approximates the inferior edge of the spinous process of the 5th lumbar vertebra. There is a clear cut line of pseudoarthrosis at this level showing that the tempted fusion by Doctor Taylor is not in effect. There is no reaction on either side of this line however and one would not think that there

Exhibit A—(Continued)

should be any cause for too much distress. Inasmuch as we frequently see fused spines, or supposedly fused spines with pseudoarthrosis, in which the patient is under the impression he has a fused back and he gets along perfectly well.

Impression: It is my impression that this man had a probable herniated disk, and which on a private patient would have resulted in a successful cure after the surgery.

The man is making the most of his disabilities. Casual examination of his hands and their musculature would lead me to think that he is doing considerable in the way of activity. Judging from the lack of objective findings today other than the unwillingness to bend back with any of the joints of the spine, which is certainly not rational, granted that everything was wrong at the lumbosacral joint, in view of the fact that there is no calf atrophy, and that all leg complaints have disappeared, it is my impression that this patient is not more than 25% disabled at this time.

The question of possible further therapy was discussed with the patient and he stated that he doesn't want anything whatsoever done. It would seem to me that a man only 35 years old, if he were having any considerable amount of difficulty at the lumbosacral joint, it would be perfectly amenable to a fusion and the patient should be willing and able to undertake it without any great amount of risk.

This would be a foolish recommendation on a

Exhibit A—(Continued)

compensation patient however, inasmuch as I have never seen one yet who would admit that he had as good a back as this man has today.

Very truly yours,

/s/ CHRISTOPHER MASON

cm/mf

Filed Aug. 23, 1946.

Copy forwarded to Washington.

Received Aug. 23, 1946, District No. 13.

Federal Security Agency—Bureau of Employees' Compensation—Before Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District.

Case No. DB-P-1-715 Injury of 12-2-41

Case No. DB-P-61-65 Injury of 1-13-42

FRED F. LAIRD,

Claimant,

vs.

CONTRACTORS, PACIFIC NAVAL AIR BASES, PACIFIC BRIDGE COMPANY,

Employers.

LIBERTY MUTUAL INSURANCE COMPANY, U. S. FIDELITY & GUARANTY CO.,

Insurance Carriers.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, in the Grand Jury Room, U. S. Post Office Building, Los Angeles, California, on Monday, November 22, 1948, at 9:30 o'clock A.M.

Appearances

Claimant present in person, and represented by Mr. L. R. DUBIN, attorney at law, appearing for Charles Blek, claimant's attorney.

Defendants, Contractors, Pacific Naval Air Bases, and Liberty Mutual Insurance Company, represented by Mr. CLAUDE F. WEINGAND, attorney at law.

Defendants, Pacific Bridge Company, and U. S. Fidelity & Guaranty Company, represented by Mr. VIRGIL L. BROWN, attorney at law.

Mr. Pillsbury: Hearing on petition for termination of liability under award in two cases which have been consolidated heretofore for hearing because of their interlocking nature.

Claimant is present and is represented by Mr. Dubin, appearing for Mr. Blek, claimant's attorney of record. Defendants, Contractors, Pacific Naval Air Bases, and Liberty Mutual Insurance Company are represented by Mr. Claude F. Weingand, attorney at law. Defendants, Builders Pearl Harbor Dry Dock No. 4 and U. S. Fidelity & Guaranty Company are represented by Mr. Virgil L. Brown, attorney at law.

In the first of these two files, DB-P-1-715, involved herein, Fred F. Laird vs. Contractors, Pacific Naval Air Bases, and Liberty Mutual Insurance Company, compensation order was entered on November 4, 1942, awarding to claimant compensation for temporary total and partial disability as therein stated for injury of December 2, 1941 at Johnston Island, the case coming within the provisions of the Defense Bases Compensation Act. This awarded him compensation for total disability from December 5th

to and including December 12, 1941, in the sum of $28.57.

It was further found that on January 13, 1942 claimant further injured himself increasing the same disability by further injury while in the employ of Builders Pearl Harbor Dry Dock No. 4, and was thereafter disabled from labor by reason of the joint effect of the two injuries. Compensation was awarded for one-half of the weekly rate against the defendants herein until the further order of the Deputy Commissioner.

An order fixing medical expenses was filed on April 16, 1943, and an order denying petition for modification and termination of award was denied by order of September 16, 1946.

In the other file, DB-P-61-65, Fred F. Laird vs. Builders Pearl Harbor Dry Dock No. 4, and U. S. Fidelity & Guaranty Company, a similar compensation order was entered on November 4, 1942, awarding to claimant compensation for one-half his disability at the rate of $12.50 a week until further order for the injury of January 13, 1942, reference being made to the earlier injury in which the other half of the weekly payments were ordered.

An order fixing medical expenses was filed on April 16, 1943, and an order denying petition for termination of liability was filed on September 16, 1946.

Defendants, Contractors, Pacific Naval Air Bases have filed herein their petition for termination of liability on November 1, 1948. Defendants Builders

Pearl Harbor Dry Dock No. 4 and U. S. Fidelity & Guaranty Company simultaneously filed a similar petition. Claimant was apprised of the filing of these petitions, and by letter of his attorney, Mr. Blek, of November 5, 1948, stated that the petitions were opposed. The matter therefore comes on for hearing upon the consolidated transcript on both of said petitions.

Mr. Weingand, do you desire to elaborate on your petition for the record?

Mr. Weingand: Mr. Pillsbury, I take it that the statement which you have just made and which your good reporter is transcribing is but a resume of what the proceedings have been to date.

Mr. Pillsbury: That is correct.

Mr. Weingand: I take it that each of the decisions and the terms thereof speak for themselves.

Mr. Pillsbury: That is correct.

Mr. Weingand: And you are only attempting to summarize what had transpired before, in making the statement.

Mr. Pillsbury: That is correct.

Mr. Weingand: On behalf of Contractors, Pacific Naval Air Bases, and its compensation insurance carrier, Liberty Mutual Insurance Company, we stand on the allegations as they are set out in each and all of the paragraphs of the petition to terminate. I do not think at this time any further elaboration would be of assistance or help to you.

Mr. Pillsbury: Mr. Brown?

Mr. Brown: I would like to make the same state-

ment since the facts and orders are similar in both cases.

Mr. Weingand: Mr. Pillsbury, I do not know what the attack will be, but can it be understood that any objection which I make shall be deemed to also be the objection of the U. S. Fidelity & Guaranty Company and its assured, unless the contrary is stated for the record?

Mr. Pillsbury: Is that satisfactory to you, Mr. Brown?

Mr. Brown: Yes.

Mr. Weingand: And the situation should be the same with reference to any objection by Mr. Brown, as attorney for the U. S. Fidelity & Guaranty Company. I thought that would perhaps shorten the time of this hearing.

Mr. Pillsbury: Mr. Dubin, do you wish to make any preliminary statement?

Mr. Dubin: Just that Mr. Weingand stated he did not know what the line of attack would be. We do not intend to attack anything that is stated herein. We also stand upon the record and any statement or written record that is made here. It is my understanding that any attack upon the record is to be set forth by the gentlemen here.

Mr. Pillsbury: Mr. Laird, do you still claim you are not recovered from your injury?

The Claimant: Yes.

Mr. Pillsbury: And you are still suffering a loss in wage earning capacity because of your two injuries?

The Claimant: Yes.

Mr. Pillsbury: With reference to one point made in the petition for termination, I will make a statement at this time. The petitions assert that each of said defendants has now paid $3,750 in compensation payments, or more; that the total liability of defendants together is limited to $7,500, under Section 14 (m) of the Longshoremen's and Harbor Workers' Compensation Act, and therefore they are not under obligation to make further disability payments. I will rule against this contention and have so advised the parties heretofore. It is my understanding that Section 14 (m) imposes a liability of $7,500 against each employer separately from the other, inasmuch as we are dealing with two separate injuries at different dates and in different employments, even though their combined effect cooperated to produce the disability since the last jury. I am advised by the Chief Counsel of the Bureau that he follows the same construction of the Longshoremen's and Harbor Workers' Compensation Act.

Mr. Weingand: Mr. Pillsbury, inasmuch as you have already expressed yourself with reference to what the decision will be in that regard, and in order that the record may be perfected for an appeal, both defendants respectfully request the issuance by you of an order in each of these cases, disallowing the petitions, and that in the order you make a specific finding that each carrier is liable for compensation payments in each case not to exceed $7,500, or until termination of disability, or further order of the

Commission. The reason we specifically request such an order is that then the point is squarely at issue and can be passed on in an appeal.

Mr. Pillsbury: I will give you a specific finding in my decision on that ground.

Mr. Weingand, you may proceed with your evidence on your contention that Mr. Laird has recovered from his injury.

Mr. Weingand: Would you be kind enough, Mr. Pillsbury, to give me from your file the date of the last hearing?

Mr. Pillsbury: August 19. 1946. Just a moment, Mr. Weingand: I wish the record now to show the date to which compensation is paid in accordance with the compensation orders by each set of defendants, and the gross amount paid.

Mr. Weingand: Mr. Pillsbury, I am handicapped in giving you the exact amount of compensation paid for the reason that I have had the insurance company's file for several weeks. I think I can state, and Mr. Laird can verify it, that compensation has been paid, and is being paid by Liberty Mutual currently.

The Claimant: Yes.

Mr. Pillsbury: Mr. Brown?

Mr. Brown: Our total is $4,425.

The Claimant: That is correct.

Mr. Brown: That is through November 15, 1948.

The Claimant: Correct.

Mr. Weingand: I think the record should show, on behalf of both carriers, and the employers they

respectively represent, that any payments made by the carriers, or either of them, subsequent to the payment of $3,700 by each carrier, is made without any admission of liability and under protest.

Mr. Pillsbury: I never regard a payment as an admission of liability where liability is otherwise contested, from motives of public policy. I wish to get cooperation from the insurance companies in continuing payments where a controversy exists and will not hold it against them as an admission.

FRED F. LAIRD

claimant, testified as follows:

Q. (By Mr. Weingand): Mr. Laird, have you been employed since the date of the last hearing, August 19, 1946?

A. Only in my produce market?

Q. (By Mr. Pillsbury): You have been employed? A. Yes, in my produce market.

Q. (By Mr. Weingand): Where is that?

A. 10802 Hawthorne Boulevard, Inglewood.

Q. Do you own the produce market?

A. Yes, sir.

Q. When did you buy it?

Mr. Pillsbury: Just a moment. Let me clear one point: Have you been making as much as $300 a month in that market? A. No, sir.

Mr. Pillsbury: All right.

Mr. Weingand: Is that the wage as of the date of injury?

Mr. Pillsbury: Yes.

(Testimony of Fred F. Laird.)

Mr. Weingand: The decision against my company?

Mr. Pillsbury: Yes. In the Liberty Mutual case the actual monthly wage at the time of injury was found to be $300 a month. In the U. S. Fidelity & Guaranty case, the wages at time of injury are stated in the compensation order to be $100 a week. Proceed.

Q. (By Mr. Weingand): When did you acquire the produce market?

A. I believe about something over two years ago.

Q. You sell vegetables and fruits?

A. Yes.

Q. How many employees do you have, other than yourself?

A. I don't have any employees steady other than I have a boy that helps me and a woman that helps me.

Q. How many hours a day are you open?

A. The store is open from 9:00 to about 6:30.

Q. I take it that is true with reference to the produce market? A. Yes.

Q. How many days a week?

A. Seven days a week.

Q. (By Mr. Pillsbury): How much have you been earning a week on an average, say, over the last six months?

A. I would say an average of about—mostly that is figured on a monthly basis.

Q. How much a month?

(Testimony of Fred F. Laird.)

A. $140. Here is $147.96 for the month—this last month.

Mr. Weingand: That is the month of October?

A. Yes, October.

Q. (By Mr. Pillsbury): Have you invested any capital in the market?

A. No, only I did put in a frozen food box.

Q. That does not represent any appreciable expense or invested capital? A. No.

Q. (By Mr. Weingand): What did you average, Mr. Laird, for the month of September, 1948?

A. $112.28.

Q. Will you take us back six months, if you please? A. Six months back?

Q. I mean month by month.

A. You have September; August $147.16; July $186.26, and you have June $38.64; and May $129.63; you have April $99.69; March $47.57; and February $89.94.

Q. January? A. January $116.91.

Q. December?

A. That is over in a different book here now. This bookkeeper has got it all balled up.

Q. Mr. Laird, I take it you have been testifying from certain books and records you have produced in response to a subpoena served on you?

A. Yes.

Q. May I please see those records?

A. Yes.

Q. Mr. Laird, in arriving at these figures which

(Testimony of Fred F. Laird.)

you have given, how much have you charged to the business for your own services, showing either as a drawing account or salary, or otherwise?

A. Nothing.

Q. (By Mr. Pillsbury): Do you have any other income from labor?

A. No, just this compensation insurance.

Q. And your earnings in the market?

A. Yes.

Q. (By Mr. Weingand): Mr. Laird did you bring with you your copy of your return to the Bureau of Internal Revenue? A. Yes.

Q. With reference to the tax paid for the calendar year 1947? A. Yes.

Q. May I see it, if you please? A. Yes.

Mr. Pillsbury: While you are looking at that, Mr. Laird, has there been any improvement in the condition of your back in the last two or three years? A. No, sir.

Q. Has it gotten any worse?

A. No, sir. Sometimes I thought it was for a while and I eased up on my activities.

Q. How long would you say the impairment of your back has been stationary?

A. I would say nearly ever since I left the hospital.

Q. When was that?

A. That was back, I believe, in 1943.

Q. It has been stationary for the last five years?

A. Yes, something like that.

(Testimony of Fred F. Laird.)

Q. Have you tried any other employment in the last year? A. No.

Q. (By Mr. Weingand): Now, Mr. Laird, have you done any work or earned any money at any trade, occupation or work other than that which you devoted to the operation of this produce market?

A. No; only I oversaw the painting of a house for a friend of mine, and I received very little for that. He paid his boys and I sort of supervised it.

Q. (By Mr. Pillsbury): When was that?

A. It was last year some time.

Q. How long did that last?

A. Oh, about a week.

Q. How much did you receive?

A. I think I received $25 for my trouble.

Q. (By Mr. Weingand): Have you done any carpenter work of any kind since the date of the last hearing? A. No, sir.

Q. Have you done any painting yourself of any kind? A. No.

Q. Didn't you just recently paint the interior of a house? A. No.

Q. Have you done any work of any kind other than carpentry, painting or the produce market since the date of the last hearing? A. No, sir.

Mr. Dubin: I don't think he stated he had done any other work.

Mr. Weingand: The question was certainly ambiguous, compound, and leading, counsel. Q. Have you done any work other than supervising the paint-

(Testimony of Fred F. Laird.)

ing of a house, and operating your produce business, since the date of the last hearing? A. No, sir.

Q. (By Mr. Pillsbury): Mr. Laird, you appreciate you are still under oath? A. Yes, sir.

Q. (By Mr. Weingand): Mr. Laird, you were convicted of a felony, is that a fact?

A. Yes, sir.

Mr. Dubin: May I ask just what bearing that would have upon the case at hand?

Mr. Weingand: Counsel, the question is a preliminary one. If in your opinion I do not tie it up, please make the objection at that time, but I might state that the question is a proper one even at the present time for the purpose of impeachment.

Q. Mr. Laird, the offense for which you were convicted was contributing to the delinquency of a minor, is that correct? A. Yes.

Q. Did you make application for probation in connection with that criminal proceeding?

A. Yes.

Q. And probation was granted? A. Yes.

Q. Who was the probation officer to whom you reported and who reported in your behalf?

A. Mr. Haig, I believe.

Mr. Pillsbury: How do you spell it?

A. H-a-i-g, I believe.

Q. (By Mr. Weingand): Do you recall a Perry L. Douglas, Deputy Probation Officer?

A. Yes.

Q. Who interviewed you? A. Yes.

(Testimony of Fred F. Laird.)

Q. State whether or not on the occasion of his interview with you concerning your request for probation——

Mr. Pillsbury: What was the date of the interview?

Mr. Weingand: October 2, 1946. ——whether you stated to him that you averaged about $500 a month from your work and business.

A. I don't remember that, of stating that to anyone.

Q. Would you state that you did not so advise or inform or tell Mr. Perry L. Douglas?

A. I don't think I did. No, I know I did not because I was not making it.

Mr. Weingand: At this time, Mr. Pillsbury, I offer in evidence the record of the Superior Court of the State of California, in and for the County of Los Angeles, in case No. 106,667, entitled People vs. Fred Laird, and I will refer specifically to page 2 of the probation officer's report of October 2, 1946. I will call counsel's attention to the first paragraph in that probation report.

Mr. Pillsbury: If the offer is limited to the paragraph mentioned I will receive the paragraph in evidence and read it into the record. This appears on page 2 of the document entitled "Probation Officer's Report, Court No. 106,667, filed by Perry L. Douglas, Deputy." Going back to the last line on the preceding page, following reference to a back injury in the Hawaiian Islands, the following ap-

(Testimony of Fred F. Laird.)

pears: "Since that time he has been building houses and selling them and working also as a carpenter. This defendant states that he averages about $500 per month from his work and business." Is there anything else you wish read into the record?

Mr. Weingand: Not at this time, Mr. Pillsbury.

Mr. Pillsbury: Mr. Laird, I want at this time to emphasize to you the necessity of your telling the exact truth. I am not implying that I have yet decided that you are not, but if you are caught in any material fabrication it will cast grave doubt upon all of your statements. A. Yes, sir.

Mr. Weingand: When you read this paragraph, Mr. Pillsbury, into the record, did you read it $500 or $300?

The Reporter: $500.

Q. (By Mr. Weingand): Did you tell the probation officer on or about October 2, 1946 that your wife earned $80 per month from her work?

A. I don't remember telling him anything about my wife.

Q. Do you remember telling him you owned a 1940 Chevrolet club coupe?

A. I don't remember telling him, but I do.

Q. Isn't it a fact your wife was earning about $80.

Mr. Pillsbury: Earnings of the wife would not be material.

Mr. Weingand: This is testing his recollection and and in the nature of impeachment.

(Testimony of Fred F. Laird.)

Mr. Pillsbury: It is not necessary to go into collateral matters to test it.

Q. (By Mr. Weingand): Did you tell the probation officer at the date which we have related that you had just sold the place where you were located at the time of the offense? A. I believe so.

Q. Did you tell him you had bought another house? A. Yes, I had.

Q. Where was it located?

A. 1013 Rosewood, Inglewood.

Q. Did you tell him you had sold the court for $13,500?

A. I did not tell him I bought a court. I bought a house.

Q. Did you tell him there was a balance of $8,500 due on it? A. I believe so.

Q. Did you tell him you had about $8,000 in savings?

A. No, I did not, because I didn't have.

Q. Did you tell him you did have?

A. I don't believe that I did.

Q. Is that your best recollection now?

A. Yes, it is.

Q. How much did you have in savings on or about October 2, 1946? A. I don't remember.

Q. What is your best recollection?

Mr. Pillsbury: That is getting a little remote; that is two years ago. I am interested primarily in his earning capacity at about the time of the filing of the application for termination of liability.

(Testimony of Fred F. Laird.)

Mr. Weingand: You see, Mr. Pillsbury, we have had no way of interrogating this man since the date of the last hearing, and that was in 1946, and all of these——

Mr. Pillsbury: I still do not wish to build up a long record by inclusion in it of matters quite remote if it can be avoided.

Q. Have you owned this produce market throughout the whole period?

A. I have owned it about—since about the time I bought the house on Rosewood.

Q. (By Mr. Weingand): Do you own any property other than the house? A. No.

Q. Now, at the time of the happening of these accidents you were married, were you?

A. Yes.

Q. What was your wife's name?

A. Lora Laverne.

Q. And your wife has sued you for divorce?

A. Yes, about the time of this termination or you notified Mr. Pillsbury.

Mr. Pillsbury: What is the date of the complaint?

Mr. Weingand: I was just trying to find it. About the 30th day of December, 1947.

A. That was the date it was filed. The divorce was granted July 22nd of this year.

Mr. Pillsbury: Interlocutory decree?

A. Yes.

(Testimony of Fred F. Laird.)

Q. (By Mr. Weingand): In her favor, against you? A. Yes, I conceded it to her.

Q. Mr. Laird, do you have a cash register at your place of business? A. Yes.

Q. When you make a sale of produce, is it customary, do you always ring up the money in the cash register? A. Yes.

Q. During the pendency of the divorce proceedings your wife had you cited in an order to show contempt, or an order to show cause in re contempt?

A. Yes.

Q. And in connection with that citation your wife filed with the Clerk of the Superior Court, in and for the County of Los Angeles, an affidavit stating or setting forth that your total monthly income was $500 a month; isn't that correct?

A. That is right, but my books showed different, and the judge ruled against her and threw it out.

Mr. Weingand: Have you seen this, counsel?

Mr. Dubin: No, I have not. However, I do not particularly see, counsel, that the wife's affidavit as to what she believed Mr. Laird's earnings to be, how that would be pertinent or material in this case.

Mr. Pillsbury: Are you making an objection?

Mr. Dubin: Yes, I make it on the ground it is immaterial and irrelevant.

Mr. Brown: Your Honor, on that question, I think it is generally conceded at that time they were husband and wife and she knew, must have known approximately what the earning capacity of her husband was.

(Testimony of Fred F. Laird.)

Mr. Pillsbury: The obvious ground for an objection would be it is hearsay. Is there any reason why the lady cannot be brought in in person to give her information?

Mr. Weingand: Her whereabouts are unknown to either of the defendants, and I take it we have an official record of the Superior Court and we expect to offer the entire record as an exhibit for the defendants in this proceeding, and it is a matter of which this Commission can take judicial notice.

Mr. Pillsbury: With reference to the affidavit of the wife in the other proceeding, the evidentiary weight is not strong because of it being hearsay, but we are not bound by the formal rules of evidence. In view of the showing that you cannot locate her, I will overrule the objection.

Offers in evidence document entitled "Wife's Questionnaire; Affidavit for order to show cause in re attorneys' fees, court costs, alimony pendente lite; allowance for support and/or custody of child, and restraining order" in the proceeding entitled Lora Laverne Laird vs. Fred F. Laird, D-352,866, affidavit being sworn to by Lora Laverne Laird, the relevant portion of the affidavit being question 6 (a), What is your total income from all sources $70.00 net, and 6 (b) of your husband $550.00; 7 (a) what was the net income from all sources last year, specify sources: Of yourself $250.00; of your husband approximately $6,600.00.

Is there anything else?

(Testimony of Fred F. Laird.)

Mr. Weingand: That is all, Mr. Pillsbury, with reference to that particular phase of this case. I might say, Mr. Pillsbury, that that affidavit of the wife tends to confirm this statement we contend this man made to the probation officer in October of 1946.

Q. Mr. Laird, are you still on probation?

A. Yes.

Q. To whom do you report?

A. To Mr. Haig.

Q. When you were convicted of this offense you were fined $500.00? A. Yes.

Q. Payable within 24 hours? A. Yes.

Q. From what source did you get the $500.00?

A. From what we had from selling the house.

Q. Do you have a checking account at the present time? A. About $7.79.

Q. May I see that. What branch?

A. Security-First National, Inglewood.

Q. How long have you been a depositor there?

A. For a number of years.

Q. Within the last year what has been your average monthly balance?

A. Very little, something like that, $7.79.

Q. How do you pay your bills? A. Cash.

Q. At the store? A. Yes.

Q. Do you have any other accounts?

A. No.

Q. Do you have any savings account?

A. Absolutely not.

(Testimony of Fred F. Laird.)

Q. Do you have any bonds? A. No.

Q. And you own no property at the present time?

A. I own the house at 1013 Rosewood and it is for sale, and the produce market, and the 1940 Chevrolet club coupe.

Mr. Weingand: I have no further questions.

Q. (By Mr. Brown): This amount which you say you earned net each month in your produce business, is that after all your expenses have been paid?

Mr. Weingand: Would you have any further need, counsel, for these records? There are two men from the Superior Court here.

Mr. Dubin: Not for this one.

(The question was read.)

A. Yes.

Q. (By Mr. Pillsbury): The amount you mention is net? A. Yes.

Q. (By Mr. Brown): What expenses are included?

A. I pay this woman a dollar a day when she works and I pay $5.00 a day on Sundays for a boy that helps, and my frozen food bill, and my fresh vegetables.

Q. Your own personal expenses are deducted?

A. No.

Q. Then your personal expenses come out of this? A. Yes.

Mr. Brown: Do you have a copy of Dr. DeWard Jones' report dated October 27, 1947? I

(Testimony of Fred F. Laird.)
know I am late but I doubt if you have received a copy of it; I have the original here. [24]

Mr. Pillsbury: Mr. Brown, why offer medical reports? Your petition, if I remember correctly, did not allege any change in condition, but was solely on the contention that claimant's earnings were higher than at the time of injury.

Mr. Brown: I have it in the file, and I think it should become a part of that file in the event an appeal is taken.

Mr. Pillsbury: There may be considerable harm to claimant if you introduce any issue here not raised in your petition.

Mr. Brown: I am not raising any particular point on the medical report at this time. I think possibly we have discussed this matter. I am not raising any particular point, but it is a part of the file and you have never been given a copy of it.

Mr. Weingand: Mr. Brown, if I remember correctly we have several medical reports subsequent to the date of the last hearing. Am I correct?

Mr. Pillsbury: I will add it to the file then.

Mr. Weingand: I think it should be withdrawn.

Mr. Pillsbury: Withdrawn.

Mr. Weingand: There is no contention at this time the man's disability has terminated.

The defendant Liberty Mutual Insurance Company rests.

Mr. Brown: The U. S. Fidelity & Guaranty Company rests.

(Testimony of Fred F. Laird.)

Mr. Weingand: That is from this witness.

Mr. Pillsbury: You have other witnesses? [25]

Mr. Weingand: No, sir, but I may want to further examine Mr. Laird, assuming his counsel brings out other facts.

Mr. Pillsbury: Do you rest, Mr. Brown?

Mr. Brown: Yes.

Q. (By Mr. Weingand): Do you know the address of your wife?

A. 1013 Rosewood, Inglewood, phone Orchard 72638. She told me some insurance man was down there trying to get her to come in.

Mr. Weingand: I ask that voluntary statement be stricken from the record.

Mr. Pillsbury: Denied.

Mr. Brown: It is strictly hearsay.

Mr. Pillsbury: You have just succeeded in getting into evidence a hearsay affidavit.

Mr. Dubin, take the witness.

Q. (By Mr. Dubin): Mr. Laird, at the time that Mr. Perry L. Douglas interviewed you in reference to your conviction in the other case that was brought out by counsel, do you remember saying at any time that your earned $500 a month from your business? A. No, I do not.

Q. Do you remember saying that you actually built any houses? A. No.

Q. You have testified that you supervised the painting [26] job; in that particular instance did you do any work? A. No.

(Testimony of Fred F. Laird.)

Q. In other words, you could do painting work without actually working yourself? A. Sure.

Q. Is it possible that a house could be built without a person himself doing the work?

A. Certainly.

Q. Were you ever arrested before that time?

A. No, sir.

Q. Were you worried at the time you were arrested?

Mr. Weingand: Objected to as immaterial.

Mr. Dubin: It was brought out by counsel and I am asking as to his state of mind.

Mr. Pillsbury: I do not like to get drawn into a criminal case, but you are allowed to rebut unfavorable testimony.

Mr. Dubin: I am merely attempting to show the state of mind of Mr. Laird at the time, which I believe under the rules is admissible.

Mr. Brown: We have the date of the report of the probation officer and the interview. May I ask what date you were arrested?

A. I don't remember.

Mr. Pillsbury: You are referring to his state of mind at [27] the time of the interview, not at the time of the commission of the offense?

Mr. Dubin: Yes.

Mr. Pillsbury: Proceed.

Q. (By Mr. Dubin): Were you worried at the time you were arrested—strike that, please. Were

(Testimony of Fred F. Laird.)

you worried at the time you were interviewed by Mr. Douglas in connection with this crime?

A. Yes, I was, and my back was giving me considerable trouble in there, too.

Q. Would you say you were thinking as clearly as you would ordinarily be thinking?

A. No, sir.

Q. Were you a little excited?

A. The main thought was trying to get out of there.

Q. In other words, you were excited?

A. Yes.

Q. Is it possible that what you stated may have been inaccurately stated by you?

A. If that is what I stated it certainly was inaccurate.

Q. Now in this order to show cause and the affidavit as to your earnings, I believe the affidavit states that according to your wife you were making $550 a month. At the time were your wife's feelings toward you of a friendly nature?

A. Not by a long shot. [28]

Q. In other words, in this particular type of case, they were not friendly?

A. She was trying to get everything she possibly could get.

Q. I also point to the husband's questionnaire in the same record of the Superior Court in the same case, question 2 (b), what is your present

income, answer $100. Did you make that statement?

A. That is right, approximately that.

Q. In other words, in 2 (b), in the husband's questionnaire, there was a wide difference in what your wife claimed you made, and what you claimed?

A. Yes.

Mr. Weingand: I do not want to unnecessarily object, but you are testifying in practically every question, they are leading, and the last was argumentative and you answered it yourself. I ask that it be stricken.

Mr. Pillsbury: Be more careful about your questions.

Q. (By Mr. Dubin): Yes. I point to a copy of a minute order, decreed by the court in the same case, in which the judge decreed that $45.00 a month was to be paid by you for the support of your child in this particular action; is that true?

A. That is true, and that is all.

Q. That was a copy of a minute order in the contempt proceeding? [29]

Mr. Brown: Just a minute. There was no part of that referred to except the affidavit.

Mr. Pillsbury: The bars are down on hearsay on this particular matter.

Mr. Weingand: The order speaks for itself.

Mr. Pillsbury: It is a fact there was an order to that effect, is it?

Mr. Weingand: I do not know.

Mr. Pillsbury: Show me the order.

(Testimony of Fred F. Laird.)

A. There was an order to pay $45.00, and that was all I was ordered to pay.

Mr. Weingand: I ask that be stricken; the order will speak for itself.

Mr. Pillsbury: The record in the divorce proceeding contains a copy of a minute order dated January 15, 1948, on order to show cause re alimony pendente lite, attorneys' fees, support and maintenance of child and restraining order, which awarded the custody of the minor child to the plaintiff and orders the defendant Fred F. Laird to pay to the plaintiff $22.50 semi-monthly on the 1st and 15th days of each month beginning January 15, 1948, for support of the minor child; other matters continued to the time of trial.

Mr. Weingand: Is that the order to which you refer?

Mr. Dubin: Yes.

Mr. Pillsbury: There has since been an interlocutory [30] decree, I am informed.

A. May I clarify the matter just a little?

Mr. Pillsbury: Just a moment.

A. In the meantime they transferred it to Inglewood and it is probably in the Inglewood file, and at that time I was ordered to pay $45.00 for the boy.

Mr. Pillsbury: In this connection I find in the file a copy of minute order of March 22, 1948, purging defendant of contempt and fixing arrearage in the sum of $242.50, apparently for attorney's fees

(Testimony of Fred F. Laird.)

—correction, I find in the file findings of fact by the court commissioner and order dated May 10, 1948, find arrearage due on April 26, 1946, was $75.00 on attorney's fees, and $195.00 on the monthly payments on the house. This order also recites that defendant's net income from the operation of his fruit and vegetable stand was $47.57 in March, 1948, and $99.69 in April, 1948; that defendant had made all the payments for child support ordered on January 15, 1948, being $45.00 a month; that defendant has not had the ability to comply with the order of January 15, 1948, excepting to the extent that he has complied with the payments for child support. Copy of minute order of May 10, 1948, dismisses the contempt matter. Interlocutory decree is not contained in the file.

Proceed, Mr. Dubin.

Q. (By Mr. Dubin): Your grocery and vegetable establishment, [31] is it a large place?

A. No, it is only a produce market, no grocery.

Q. Is it small?

A. It is 20 feet long and eight feet wide.

Q. In the ordinary course of business is it customary in this particular type of business to pay your bills in cash?

A. Yes; in fact, you have to, they won't trust you.

Q. Does your back still trouble you?

A. Yes.

(Testimony of Fred F. Laird.)

Q. In what respect?

Mr. Pillsbury: There is no issue being raised on that.

Q. (By Mr. Dubin): Approximately what were you earning in the way of salary at the time of your injuries?

Mr. Pillsbury: That is covered by the compensation order. I have stated for the record the contents of the compensation orders.

Q. (By Mr. Dubin): What are your earnings now from this vegetable stand and market?

A. Around $100.00 a month, something like that, average.

Q. How many days a week do you work?

A. I am there about six days, part of the time.

Q. How many hours day?

A. From four to six, eight hours.

Q. Do you do any heavy work?

A. No, sir. [32]

Q. Why not?

A. On account of my back, it will not allow it. I can't stand on my feet.

Mr. Weingand: Again we are getting into the realm of the disability.

Mr. Pillsbury: Yes, strike the last question.

Mr. Dubin: I believe, your Honor, in the examination by counsel that was gone into.

Mr. Pillsbury: I went into one phase of the matter, as to whether disability had reached a permanent stage, as I did not notice in reviewing the com-

(Testimony of Fred F. Laird.)
pensation orders hurriedly a finding that it had reached a permanent stage at the time of the last orders.

Mr. Weingand: My questions, counsel, with reference to how much work he did had to do with his earnings, not with his physical ability to do the work.

Q. (By Mr. Dubin): As to your income, you have records that you were subpoenaed to bring?

A. Yes.

Q. Do you have your income tax return?

A. Right here.

Q. $2,086.98, for the year 1947, is that a record of your total earnings for that year?

A. Yes.

Q. Did you have any other income? [33]

A. No, any more than the compensation insurance.

Q. Have you been able to live and buy the necessities of life on that income?

Mr. Weingand: Objected to as immaterial.

Mr. Pillsbury: Objection sustained.

Q. (By Mr. Dubin): In this grocery store, as to any future earnings, is there anything that would tell you in the future that you may make more money than what you are making now?

Mr. Weingand: It is probing into the future, crystal gazing, surmise and speculation.

Mr. Pillsbury: Sustained.

Q. (By Mr. Dubin): This income tax return,

(Testimony of Fred F. Laird.)

this is the only income tax return that was filed by you for 1947? A. Yes, sir.

Q. This statement as to your bank account balance, $7.79 of August 4th, is this the only statement that has come to you as to the balance in the past month? A. Yes, that is the last month.

Mr. Pillsbury: You said August.

Mr. Dubin: That would be for the month of July.

A. That is my only statement and is the only account I have.

Q. You have closed your account since?

A. No, I am holding it just like that. They probably will close it. [34]

Mr. Dubin: That is all.

Mr. Weingand: I have no further questions.

Q. (By Mr. Brown): This property that you owned at the time of the divorce proceeding, was that granted to the wife?

A. No, 50-50 division of all property.

Q. She was awarded one-half? A. Yes.

Q. Is it up for sale?

A. Yes. Not at this time it is not for sale, because I do not have her signature on the listing yet, but it has to be sold to take care of the court costs.

Mr. Brown: That is all.

Mr. Pillsbury: That is all; hearing closed.

Mr. Dubin: During the last five years our office has done considerable work in this case and

(Testimony of Fred F. Laird.)
we have not had any fee since 1943, and I would like to make a request for attorney's fees.

Mr. Pillsbury: Very well. Case submitted.

CERTIFICATE OF REPORTER

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on November 22, 1948.

/s/ HELEN G. SCHULKE,
Reporter.

[Endorsed]: Filed D.C. August 30, 1949.

[Endorsed]: Filed C.C.A. November 8, 1949.

Filed Nov. 30, 1948.

Received Nov. 30, 1948, District No. 13.

Copy forwarded to Washington.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, in the above-entitled case, are the originals filed in this Court,

and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction.

Motion of Deputy Commissioner to Dismiss Complaint.

Certificate of Record, Case No. DB-P-1-715.

Certification of Transcripts of Testimony, before Deputy Commissioner, Cases DB-P-61-65 and DB-P-1-715.

Minute Order of September 9, 1949—Ordered Judgment for Plaintiff.

Opinion and Order.

Notice of Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of November, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12396. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, as Deputy Commissioner 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, Appellant, vs. Liberty Mutual Insurance Company, a Corporation, Contractors, Pacific Naval Air Bases, Pacific Bridge Company, United States Fidelity & Guaranty Co., a Corporation and Builders, Pearl Harbor Dry Dock No. 4, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed Nov. 8, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12396

LIBERTY MUTUAL INSURANCE COMPANY, a Corp., Contractors, PACIFIC NAVAL AIR BASES; PACIFIC BRIDGE COMPANY; UNITED STATES FIDELITY & GUARANTY CO., a Corp.; and Builders, PEARL HARBOR DRY DOCK No. 4,

Appellees,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,

Appellant.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, Warren H. Pillsbury, as Deputy Commissioner, hereby designates that the whole of the record, proceedings and evidence be contained in the record on appeal herein, including the certified copy of the transcript of the record and proceedings, before said WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District,

Bureau of Employees Compensation, Federal Security Agency.

Dated: November 2, 1949.

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed November 8, 1949.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNAION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant intends to rely on the following points on appeal:

1. That the District Court erred in denying appellant's motion to dismiss the complaint for an injunction against appellant seeking to restrain the execution of his Compensation Order dated December 1, 1948, denying a petition for termination of the liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424, 33 USCA, Section 901 et seq.)

2. That the District Court erred in denying ap-

pellant's motion to dismiss the complaint because the Compensation Order of the Deputy Commissioner dated December 1, 1948, was in full accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424) 33 USCA, Section 901, et seq.

3. That the District Court erred in finding that there was only one claim for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927.

4. The Court erred in setting aside the Compensation Order of the Deputy Commissioner dated December 1, 1948, finding that there were two injuries and making two separate awards as the findings of the Deputy Commissioner had become final and were not subject to judicial review on December 22, 1948, the date of the filing of the complaint.

5. That the Court erred in substituting its own independent findings of fact for those of the Deputy Commissioner, Warren H. Pillsbury.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed November 8, 1949.

No. 12,396

United States Court of Appeals For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

February 15, 1950

FRANK J. HENNESSY,
United States Attorney,
MACKLIN FLEMING,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

WARD E. BOOTE,
Chief Counsel, Bureau of Employees' Compensation,
Federal Security Agency, Washington, D. C.,
HERBERT P. MILLER,
Assistant Chief Counsel,
Of Counsel.

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No. 12,396

United States Court of Appeals For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This case arises upon a bill of complaint for judicial review of compensation orders, filed pursuant to the provisions of section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; U.S.C., Title 33, Chapt. 18, sec. 901, *et seq.*), as made applicable to persons employed at certain defense bases by the Act of August 16, 1941 (55 Stat. 622; 42

U.S.C.A., secs. 1651-1654), hereinafter called "Defense Bases Act".

Section 21(b) of the Longshoremen's Act, *supra,* provides:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Section 3(b) of the Defense Bases Act, *supra,* provides:

> "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

The office of the deputy commissioner, appellant, whose compensation order is involved is located in San Francisco, California, within the judicial district of the United States District Court for the Northern District of California, Southern Division.

Jurisdiction of this Court upon appeal is invoked under sec. 1291, Title 28, U. S. Code.

STATEMENT OF CAUSE.

First accident.

On December 2, 1941, Fred F. Laird, the claimant, injured his back in the course of his employment on Johnston Island in the Pacific Ocean while assisting to lift a derrick weighing 1200 to 1500 pounds (Transcript 134). The injury consisted of an incomplete rupture of the nucleus pulposus which injury was insufficient of itself permanently to disable him (T. 129, 130); this first injury was sustained while claimant was employed by the appellee, Contractors, Pacific Naval Air Bases, for whom the appellee Liberty Mutual Insurance Company was the compensation insurance carrier.

Second accident.

On January 13, 1942, claimant again injured his back while assisting in moving a studding form at Pearl Harbor when his foot slipped on an oil spot (T. 137); this second injury occurred while he was employed by the appellee Builders, Pearl Harbor Dry Dock No. 4, also referred to as Pacific Bridge Company (T. 136) for whom the appellee United States Fidelity & Guaranty Company was the compensation insurance carrier.

The first injury "caused a beginning weakness of the ligaments supporting the nucleus and the second

injury completed the relaxation of the ligaments. These two injuries together resulted in such a relaxation of the ligaments supporting the nucleus that a gradual complete rupture occurred." (T. 130).

On July 9, 1942, an operation was performed on claimant's spine at which time the ruptured nucleus was removed and a fusion was done of the 4th and 5th lumbar vertebrae (T. 83).

The two compensation awards.

Separate claims for compensation benefits were filed with the deputy commissioner against both employers for both injuries and were consolidated by the deputy commissioner for *hearing purposes*. On November 4, 1942, the deputy commissioner filed a separate compensation order in each case (T. 22, 46). In said compensation orders the deputy commissioner found in substance that the employee sustained *two injuries* to his back, one while in the employ of Contractors, PNAB which disabled him from December 5, 1941, until December 12, 1941; the other injury on January 13, 1942, while employed by Builders, Pearl Harbor Dry Dock No. 4, which was superimposed upon the prior disability and *added to the disability* from which he was suffering from the first injury (T. 24, 48). *No appeal was taken from said orders.* The deputy commissioner further found that claimant was totally disabled from December 5, 1941, to December 12, 1941, and directed the first employer, Contractors, PNAB and its insurance carrier to pay compensation for that period (T. 24). The deputy commissioner made a

further finding in said orders that the disability following the second injury was the combined effect of the two injuries and directed that each employer pay one-half of the weekly compensation (T. 25, 49), i.e., $12.50 per week each, for a total compensation of $25.00 per week.

Proceedings to limit liability.

When the insurance carriers of the two employers had each paid only $3,750 (that is $7,500 combined) they petitioned the deputy commissioner to terminate their respective liabilities under sec. 14(m) of the Longshoremen's Act, 33 U.S.C. sec. 914(m). Said section as it existed at the time of the injury provided:

> *"The total compensation payable under this act for injury or death shall in no event exceed the sum of $7,500."*

The deputy commissioner denied said petitions, holding that each of the employers was liable for the maximum of $7,500 provided by the statute, by reason of the two separate injuries resulting from the two separate accidents in the two separate employments.

Appellees then brought this proceeding for judicial review contending that said orders are not in accordance with law and beyond the deputy commissioner's jurisdiction "in that the $7,500 maximum applies to all awards to a single claimant, under the act, regardless of how many employers or injuries are involved, especially where the two injuries are closely connected in time and result in a single disability for which liability is apportioned" (T. 5).

Trial court redetermines the facts.

The learned trial Court thought it unnecessary to decide whether the statutory maximum liability applies regardless of the number of injuries which an employee sustains in different employments (T. 9); it determined there was but *one injury* (contrary to the findings of fact of the deputy commissioner in the compensation orders of November 4, 1942, *which had long since become final* and not subject to judicial review) (T. 11-12). Having thus determined one injury, the Court below decided that the maximum amount payable in this case had been paid and ordered that compensation be terminated (T. 13).

Questions involved in this appeal.

1. *Did the trial Court have jurisdiction to set aside the deputy commissioner's findings of fact that claimant had sustained two injuries, and substitute its own finding that there had been but one injury, when:*

(a) *the deputy commissioner's findings had long since become final;*

(b) *it was the exclusive province of the deputy commissioner to determine factually whether there was one or more injuries?*

2. *Does the limitation of total compensation payable under the Act apply to all awards to one employee during his lifetime regardless of the number of employers or the number of injuries?*

SPECIFICATION OF ERRORS.

The court below erred (1) in redetermining the question of whether there was one or more injuries; (2) in failing to grant appellant's motion to dismiss the complaint.

SUMMARY OF ARGUMENT.

Section 21(a) of the Longshoremen's Act, 33 U.S.C. sec. 921 (a) provides that all compensation orders shall become final upon the expiration of 30 days unless a proceeding for judicial review is instituted within that time. No such proceeding was commenced to review the compensation orders of November 4, 1942. Consequently said orders (and all the findings contained therein) became final on December 4, 1942. Therefore, the finding of the deputy commissioner in said orders to the effect that claimant sustained two injuries had long become final and could not be judicially reexamined in a proceeding commenced in 1948.

In addition, it is an established principle of administrative law that a finding of fact supported by evidence is not subject to redetermination by the reviewing court. Whether there was one or more injuries and the nature and extent thereof is a question of fact within the exclusive province of the trier of facts.

Since the findings in the compensation orders of two injuries were beyond review, the court below should have decided the legal questions involved,

namely, whether the $7,500 limitation of liability for injury or death applies to each employer, or to all injuries which an employee may suffer during his lifetime in all his employments. We maintain that the learned trial court should have decided that the $7,500 limitation of liability applies separately as regards separate injuries arising from separate employments.

ARGUMENT.

I.

(a) THE FINDINGS THAT CLAIMANT SUSTAINED TWO INJURIES HAD LONG BECOME FINAL AND WERE NOT SUBJECT TO JUDICIAL REVIEW.

The findings with reference to the nature and extent of the injuries and particularly that there were two injuries were contained in the compensation orders filed by the deputy commissioner on November 4, 1942. (There were no similar findings in the compensation orders filed in December, 1948, which are the subject of this review.) No proceeding for judicial review of the compensation orders of November 4, 1942, was ever instituted. Under the provisions of section 21(a) of the Longshoremen's Act, 33 U.S.C. sec. 921(a), the orders of November 4, 1942, became final on December 4, 1942. *Pillsbury, deputy commissioner v. Alaska Packers Association*, 85 F. (2d) 758 (C.A. 9, 1936); reversed on other grounds 301 U. S. 174; *United Fruit Company v. Pillsbury, deputy commissioner*, 55 F. (2d) 369 (Calif. 1932); *Associated*

Indemnity Corporation, et al. v. Marshall, deputy commissioner, 71 F. (2d) 235 (C.A. 9, 1934), rehearing denied July 19, 1934, 71 F. (2d) 420; *Didier v. Crescent Wharf & Warehouse Co.,* 15 F. Supp. 91 (Calif. 1936); *Mille v. McManigal, deputy commissioner,* 69 F. (2d) 644 (C.A. 2, 1934); *Campbell v. Lowe, deputy commissioner,* 10 F. Supp. 288 (N.Y. 1935); *W. R. Grace & Co. v. Marshall, deputy commissioner,* 56 F. (2d) 441 (Wash. 1931); *Shugard v. Hoage, deputy commissioner,* 67 App. D.C. 52, 89 F. (2d) 796 (App. D.C. 1937); *Swofford v. International Mercantile Marine Co.,* 113 F. (2d) 179 (App. D.C. 1940); *Tudman v. American Shipbuilding Company,* 170 F. (2d) 842 (C.A. 7, 1948); *Gravel Products Corp. v. McManigal, deputy commissioner,* 14 F. Supp. 414 (N.Y. 1936). Therefore when the court below set aside the deputy commissioner's finding of fact that there were two injuries, it exceeded its jurisdiction.

In the case of *Pillsbury, deputy commissioner v. Alaska Packers Association, supra,* 85 F. (2d) 758, the deputy commissioner, on February 1, 1930, filed a compensation order in which one of the findings was that claimant was an employee within the meaning of the Act; no proceeding for a review was instituted and the order became final upon the termination of 30 days. Subsequently the employer made an application for review under section 22 of the Act, which the deputy commissioner denied. In a proceeding for judicial review brought in the United States District Court under section 21(b) of the Act, the employer

sought to have reviewed the finding that claimant was an employee, which finding was contained in the compensation order of February 1, 1930. This court stated:

> "Section 21 of the act (33 U.S.C.A. sec. 921) provides that a compensation order shall become final after 30 days, unless proceedings for its abrogation are instituted in the District Court within that time. *Associated Indemnity Corporation v. Marshall,* (C.C.A. 9) 71 F. (2d) 235, 236; Id. (C.C.A.) 71 F. (2d) 420. In view of that provision, and particularly under the record made out in this case, to permit the jurisdictional fact of employment to be questioned 20 months after the original compensation order would, we think, result in frittering away the purpose of the Longshoremen's and Harbor Workers' Compensation Act."

In the case at bar the period of time is 72 months after the original compensation orders.

The above holding is consistent with the decisions in other circuits upon the same point. The courts have uniformly held that the language in section 21 means what it says, namely that an order (and necessarily the findings which comprise the order) becomes final upon the expiration of the thirtieth day unless a proceeding for judicial review is brought within that time. *Gravel Products Corp. v. McManigal, deputy commissioner, supra,* 14 F. Supp. 414 (N.Y. 1936).

(b) EVEN IF THE FINDINGS THAT THERE WERE TWO INJURIES HAD NOT BECOME FINAL, THE COURT COULD NOT SUBSTITUTE ITS FINDING FOR THOSE OF THE DEPUTY COMMISSIONER.

In *Marshall, deputy commissioner v. Pletz,* 317 U.S. 383, 388, the court stated that "under the overwhelming weight of authority in this and in the lower federal courts" the statute granted no power to the District Court to make new or independent findings of fact. The findings of fact of the deputy commissioner, supported by evidence, are final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U.S. 22 (1932); *Jules C. L'Hote v. Crowell, deputy commissioner,* 286 U.S. 528 (1932); 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Cardillo, deputy commissioner v. Liberty Mutual Insurance Company,* 330 U.S. 469 (1947).

As was said by the Supreme Court in *Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469, 478 (1947), in a general summary on this point:

> "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner,* 326 U.S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner

alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers, supra,* 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board v. Hearst Publications,* 322 U.S. 111, 131; *Commissioner v. Scottish American Co.,* 323 U.S. 119, 124; *Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 153-154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspensation or setting aside of compensation orders only 'If not in accordance with law.' "

The courts uniformly hold that whether there was one or more injuries is a question of fact. *Prince Chevrolet Co. v. Young,* 187 Okla. 253, 102 P. (2d) 601 (1940); *Head Drilling Co. v. Industrial Accident Commission,* 177 Cal. 194, 170 P. 157; *Mahoney v. Utility Roofing Co.,* 45 N.Y.S. (2d) 746 (1944) aff'd. 293 N.Y. 915, 60 N.E. (2d) 127; *Garcia v. J. C. Penney Co.,* 52 N.M. 410, 200 P. (2d) 372 (1948); *Highway Insurance Underwriters v. Stephens,* 208 S.W. (2d) 677 (Tex. 1948).

Typical of the statements made by the courts in the cited cases is that in *Prince Chevrolet Co. v. Young, supra,* 102 P. (2d) 601, 187 Okla. 253:

> "As to whether the disability resulted from a prior injury or is an aggravation of a prior injury or is caused by a new and independent injury, is a question of fact solely within the province of, and for the determination of, the State Industrial Commission and if there be any competent evidence to sustain the finding, an award based thereon will not be disturbed." (citing cases)

The court below therefore erred when it reexamined the deputy commissioner's findings of fact that there were two injuries, and substituted therefor the court's own determination that there was but a single injury.

II.

(a) AN ANALYSIS OF THE ACT AS A WHOLE SHOWS THAT SECTION 14(m) RELATES TO THE LIMITATION OF LIABILITY OF THE EMPLOYER AND NOT TO ANY LIMITATION OF COMPENSATION RECEIVABLE BY THE EMPLOYEE.

This cause involves an interpretation of Section 14(m) of the Longshoremen's Act, 33 U.S.C. Sec. 914(m). However, it appears to us that the answer to the question before the court must be determined by an analysis of the act as a whole, in order to reconcile apparent inconsistencies and produce a uniform interpretation and application.

It must be recognized that every Act of Congress, or completed system of legislation, is a product of divergent views. When the act or legislation is finally passed, it represents the best attempt of that moment to satisfy all interested parties and to protect their vital interests, insofar as possible to do so without infringing upon vital interests of other groups. In doing this the Congress or any legislature will adopt varying provisions of an act designed to satisfy the interests of varying groups. To understand a particular provision of an act, it is, we believe, desirable to look at what the provision was designed to accomplish and to examine it from the point of view of the group in whose interest it was created.

The basic purpose of the Longshoremen's Act is to provide compensation for injuries to maritime employees, as the title of the act so states. Act of March 4, 1927 (c. 509, 44 Stat. 1424). In order to carry out the purpose of the act a system of compensation was created, which, at the time it was passed, provided maximum compensation for total disability of $25 per week. Such compensation is set forth in Section 8(a) and (b) of the Act, which provides for weekly payments in cases of total disability *with no limit to the duration of time of such weekly payments.* The act clearly sets forth a scheme of indeterminate payments "during the continuance" of the total disability. Nor is there any purpose or intent or scheme in the act to limit the protection given the injured employee during the period of his total disability. Nor surely, does

anyone wish to do so. The totally disabled employee is entitled to receive all the compensation due him to the fullest extent of the act. For example, under Section 33(e), if third persons are liable in damages for causing the injury and a recovery is had, the excess over the amounts already spent by the employer go to the employee without limit. *Hitt v. Cardillo,* 131 F. 2d 233 (App. D.C. 1942). Thus, it may be seen that Section 8 is clearly related to the interests and protection of the employee and should be construed with that in mind.

In the same fashion, other provisions must be looked at from the point of view of the employer, and considered in the light of what they are expected to accomplish. Clearly, Section 14(m), as it existed at the time, was put in solely for the purpose of limiting the liability of the employer, and was designed to satisfy the interests of the employer group by putting a limit to the liability which the individual employer assumed in carrying on his business. The employee is not concerned with Section 14(m), except in a negative way. His interest is in the provisions creating compensation receivable by him, Section 7, relating to medical services, Section 8, relating to compensation for injury, and Section 9, relating to death benefits. The employee's interests are not related to Section 14(m); it is the employer's interests which are so related. The two meet only when the irresistible force of Section 8 runs into the immovable body of Section 14(m).

We conclude that Section 14(m) is an employer's provision of the act, was put in for his benefit, and should be looked at from his viewpoint. As so examined the provision is clearly and simply one of limitation of liability of the employer. It has no connection with compensation receivable by an employee.

The basic error made by the learned trial court in this cause was in looking at Section 14(m) from the viewpoint of the employee. It is not an *employee* provision at all. It is an *employer* provision.

That being so, Section 14(m) cannot be regarded as limiting the total amount of money receivable by an employee to $7,500. No such limits are contemplated by the act. Medical care may cause this amount to be exceeded, *Cardillo v. Liberty Mutual Co.,* 101 F. 2d 254 (D.C. Cir. 1938); death benefits may cause this amount to be exceeded, *International Mercantile Marine Co. v. Lowe,* 93 F. 2d 663 (2 Cir. 1938), 115 A.L.R. 896, cert. denied, 304 U. S. 565, *Norton v. Travelers Insurance Co.,* 105 F. 2d 122 (3 Cir. 1939), *Hitt v. Cardillo,* 131 F. 2d 233 (D.C. Cir. 1942), cert. denied, 318 U. S. 770; third party recovery may cause this amount to be exceeded, *Hitt v. Cardillo,* 131 F. 2d 233, 235 (D.C. Cir. 1942); and, we maintain, multiple injuries from separate employments may cause this amount to be exceeded, *Great Atlantic & Pacific Tea Co. v. Cardillo,* 127 F. 2d 334 (D.C. Cir. 1942), and cases hereinafter cited at pages 19-21. In the act itself there are no limits on the duration of time during which a totally disabled employee may receive com-

pensation for total disability. The limitation in the act is one of amount, viz., $25 per week.

As we have said, no one wishes to terminate the receipt of compensation for total disability by a wholly disabled employee. The sole motive for any limitation is that the employer does not wish to assume a liability infinite in time and amount. His legitimate interest is in a maximum limitation of the amounts *payable* by him. Accordingly, the sole scope and function of the provision is to define the maximum liability assumed by the individual employer.

That being so, the fact that an employee has recourse to more than one employer, as does Laird in this case, and as a result is able to have the duration of time of his compensation for total disability continue longer than would otherwise be the case, is wholly fortuitous, and is completely immaterial to the employer's legitimate interests under Section 14(m). Until the employer individually has paid out $7,500 as compensation for injury, there is no occasion for Section 14(m) to come into play. The design of the section is not to cut off the duration of weekly compensation received by the totally disabled employee, but to perform the totally different function of limiting the liability of the employer to a fixed amount.

The wording of Section 14(m) bears this out. It specifically uses the phrase "compensation payable",[1]

[1] "(m) The total *compensation payable* under this Act for injury or death shall in no event exceed the sum of $7,500." (Italics added.)

and not the phrase "compensation receivable", as would have been the case if the provision had been concerned with what is receivable by the employee.

Basic error of trial court.

The learned trial court erred in conceiving Section 14(m) as essentially a restriction of benefits receivable by a wholly disabled employee, rather than as a provision limiting the liability of the individual employer.

For example, the trial court's opinion posed the issue as "whether Section 14(m) states the maximum compensation an employee can *receive* for each separate injury or, as the plaintiffs urge, the maximum he may *receive* for all injuries in the course of his industrial life" (italics added) (T. 9). Yet the section is not related to what the employee *receives* but to what the employer *pays*. We submit this basic misconception led the learned trial court into the error of ignoring the plain mandate of Section 8 which provides for indeterminate monthly payments to the wholly disabled employee, to be terminated only on the termination of the disability or when the employer's liability has been exhausted. In short, the court erroneously construed the section as one of compensation and not as one of liability.

(b) THE DEPUTY COMMISSIONER PROPERLY HELD THAT EACH INJURY AND RESULTING DISABILITY MAY BE AN INDEPENDENT BASIS FOR LIABILITY OF SEPARATE EMPLOYERS FOR SEPARATE INJURIES ARISING FROM SEPARATE ACCIDENTS.

It is our position that two separate injuries resulting from two separate accidents in two separate employments may give rise to two separate liabilities, so as to extend the duration of time during which the totally disabled employee is protected by the act. Note that the maximum weekly compensation, $25 per week, is not affected and remains the same in amount.

The few authorities directly in point appear to support our position that each injury creates its own independent liability to pay compensation and that the limits of the act are limits of liability of the employer.

Oklahoma.

The Oklahoma workmen's compensation law in 85 O.S. 1941, Section 22, provides:

> "In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability *not exceeding five hundred weeks.*" (Emphasis supplied.)

The Supreme Court of Oklahoma in *Bendelari v. Kinslow,* 192 Okla. 390, 136 P. (2d) 918 (1943) stated, in a case where a subsequent accident was shown responsible for a part of the injury:

> "By reason of this provision an injured workman, who is entitled to compensation under the act, is limited by the maximum number of weeks provided, to wit: 500 weeks *for any one accident* resulting in compensable injuries or disability. *The maximum limitation provided does not apply in a case of the occurrence of separate and distinct accidents.*" (Emphasis supplied.)

New York.

In *Berner v. Caruso,* 233 N. Y. 614, 135 N. E. 940, the New York Court of Appeals affirmed an award of the State Industrial Board in a case where a derrick had fallen upon an employee in 1917, resulting in traumatic hysteria for which he was awarded compensation in a lump sum ($5,000), which covered a period extending to March, 1924. The employee recovered his health and went to work as a carpenter. On July 30, 1920, three and a half years after the first accident, he sustained another injury. This second accident resulted in psychoneurotic conditions similar to those resulting from the first accident. The board awarded compensation to the employee on a temporary total basis, *notwithstanding the fact that at the time of the second injury he had received compensation benefits for almost four years beyond the date of the second accident.*

Indiana.

In *Hollerbeck v. Blackfoot Coal Corporation,* 113 Ind. App. 614, 49 N. E. (2d) 973 (1943), it was held that a limitation of $5,000 in the Act applies to *one accident* and is not the amount which an employee

may receive for all injuries in the course of his industrial life. Accord: *Asplund Construction Corp. v. State Industrial Commission,* 185 Okla. 171, 90 P. (2d) 642 (1939) which, like the instant case, related to two successive back injuries.

No others found.

We do not know of any authority which holds that "the total compensation payable under this Act for injury or death" refers to the amount payable for several injuries combined as though they were one. Looking at section 14(m) of the act (33 U.S.C. 914(m)) as it existed prior to amendment in 1948 (this case having arisen prior to such amendment) we see that the text refers to "injury" not "injuries." The inference of the wording is that the limitation provision relates to a single separate injury, and not to all injuries suffered during a lifetime.

Practical considerations.

There are compelling reasons why the limitation on maximum compensation as provided in the act should apply separately to disability flowing from two separate injuries, whether it is the back which is injured on both occasions, or whether it is the back on one occasion and another part of the body on another. Assume that an employee injured his back in 1940 to such an extent that he could earn only 50 per cent of his former wage. Assume that he was entitled to compensation at the maximum rate of $25 per week until the sum of $7,500 had been paid. At the end of

approximately 5.7 years (in 1945 or 1946) the total amount would have been paid. If this same employee then sustained a second injury to his back which completely disabled him, he would not, according to appellees' contention concurred in by the learned trial court, *be entitled to any compensation for the new injury,* since both accidents resulted in back injuries and combined to cause the total disability; under appellees' theory the employer at the time of the second injury would pay nothing. We submit such a construction would be totally unreasonable, and that no court would deprive the employee of compensation for his second injury. And merely because two injuries occur close together in point of time, or because the injured employee files claims for compensation against his respective employers approximately at the same time, or because for convenience both claims are heard together, is no cause to deny the employee compensation for a second injury.

In *Great Atlantic & Pacific Tea Co. v. Cardillo,* 127 F. (2d) 334 (D. C. Cir. 1942), the employer insisted that because it had paid the employee compensation for a period of five years under the temporary partial disability section of the act, it was not required to make further payments for a total disability growing out of a second injury originally compensated for by the employer under the theory of partial disability. The court rejected this contention and made its award solely on the basis of what happened subsequent to the second injury.

Where the successive injuries involve separate parts of the body the unreasonableness of limiting liability for two or more injuries is even plainer. For example, if the first injury affected the back and the second injury affected the leg, and if the employee has previously received the maximum compensation for his back, then, under appellees' theory, he would not be entitled to any compensation for his leg, even though the second injury consisted of the loss of the leg. To state the problem in such fashion is to answer it.

Liberal construction of Section 14(m) by the courts.

If we accept appellees' argument thaat $7,500 is the total compensation payable for more than one injury, the conclusion is inevitable that $7,500 is the total compensation for all injuries which an employee may sustain from his apprenticeship to the grave. Such a restricted interpretation of Section 14(m) of the Longshoremen's Act has been emphatically rejected by the courts. In *Norton v. Travelers Insurance Company,* 105 F. (2d) 122 (3 C.A. 1939), the court held that the provision in section 14(m) providing for a $7,500 total compensation for injury *or* death must be considered as separate liabilities arising out of the same injury, and that both the disabled employee and his dependents have the right to receive as disability and death benefits the maximum amount of $7,500 each. Accord: *Hitt v. Cardillo, deputy commissioner,* 131 F. (2d) 233 (App. D. C. 1942) cert. den. 318 U. S. 770; *International Mercantile Marine Co. v. Lowe,* 93 F. (2d) 663 (2 C.A. 1938), 115 A.L.R.

896, cert. den. 304 U. S. 565. Similarly, it was held that the $7,500 limit for injury or death does not include medical benefits. *Liberty Mutual Insurance Co. v. Cardillo, deputy commissioner,* 101 F. (2d) 254 (C.A. D.C. 1938). If, as these decisions hold, $7,500 is not the limit for all losses payable from *the same injury,* but that death benefits and medical benefits are in addition to disability benefits, then *a fortiori* the sum of $7,500 should not be the limit payable for *several* injuries arising from separate accidents while in the employ of separate employers.

Liberal construction favored.

Assume for the sake of argument that section 14(m) of the Longshoremen's Act admits of two constructions. It has been uniformly stated that the act should be construed liberally and in favor of the wholly disabled employee wherever possible. *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C. A. 4, 1934), cert. den. 293 U. S. 581.

Opinion of court below.

The court below was of the opinion that each separate injury should not be compensated to the statutory limit, because in such event in occupational disease

cases "many, if not innumerable physical events, may be in the stream of causation" and "to interpret section 14(m) to mean that the maximum compensation stated should be multiplied by the number of events contributing to the disease would be completely unreasonable", and that "it is equally so when the bodily damage is of traumatic origin, even though in the latter case, the events contributing to the damage may be more discernibly separable" (T. 11).

No cause for alarm.

A short answer is that the maximum compensation remains at $25 per week, irrespective of the number of injuries.

But more specifically, this allusion to the effects which would follow an attempt to apply the statutory limitation to each injury will not stand analysis. It is the occupational disease itself and not the "many events" culminating in the occupational disease which is included in the term injury *by legislative definition* (Sec. 2(2), 33 U.S.C., sec. 902(2)). Hence, there would be only *one* injury, the occupational disease itself. Consequently, the problem posed by the trial Court in occupational disease cases could never arise.

CONCLUSION.

The learned trial court had no jurisdiction to redetermine the number of injuries sustained, but was bound by the findings of the deputy commissioner

that there were two separate injuries. The deputy commissioner properly interpreted Section 14(m) as a provision relating to the liability of the employer and not to the compensation of the totally disabled employee and properly applied the limitation to separate injuries in separate employments. Accordingly, the compensation orders were in accordance with law, and the complaint should have been dismissed. We ask that the judgment of the district court setting aside the orders of the deputy commissioner be reversed, and that the cause be remanded to the district court with directions to dismiss the complaint. *Cardillo, deputy commissioner v. Liberty Mutual Insurance Co.*, 330 U. S. 469 (1947).

Dated, San Francisco, California,
February 15, 1950.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,
MACKLIN FLEMING,
Assistant United States Attorney.
Attorneys for Appellant.

WARD E. BOOTE,
Chief Counsel, Bureau of Employees' Compensation,
Federal Security Agency, Washington, D. C.,
HERBERT P. MILLER,
Assistant Chief Counsel,
Of Counsel.

No. 12396.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN H. PILLSBURY,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.,*

Appellees.

BRIEF FOR APPELLEES.

FILED

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PAUL P. O'BRIEN,

TIPTON & WEINGAND,

CLAUDE F. WEINGAND,

1220 Broadway Arcade Building, Los Angeles 13,

Attorneys for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 12396.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Warren H. Pillsbury,

Appellant,

vs.

Liberty Mutual Insurance Company, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Appellees respond to Appellant's brief as follows:

Facts.

Plaintiffs (appellees here) brought an action in the United States District Court in San Francisco, to enjoin the enforcement of an award under the Naval Bases Act of August 16, 1941, as amended December 2, 1942. [Tr. 2.] Defendant Laird was injured while in the employ of one plaintiff on Johnston Island on December 2, 1941, and the injury was aggravated on January 13, 1942, while said defendant was in the employ of another plaintiff. Plaintiffs paid said defendant $3,750.00 each, totaling $7,500.00, which was the maximum prescribed by 33 U. S. C. A.

914(m) as of the time of the accidents. Because plaintiffs include *two employers* and there were two accidents, the second aggravating the residual condition left after recovery from the first accident, the defendant Deputy Commissioner (appellant here) made an award under which the insurance carriers for the two employers split the weekly payment to defendant Laird on a 50-50 basis, $12.50 per week each.

After the $7,500.00 maximum prescribed by Section 914(m) was paid out, the appellees petitioned to terminate the award. [Tr. 28, 51.] Appellant Pillsbury denied the petition. [Tr. 34, 37, 57.] The trial court granted plaintiffs an injunction against defendants' further enforcement of the award. [Tr. 8-13.] The defendant Commissioner appealed. [Tr. 13.]

ARGUMENT.

Appellant has raised several alleged issues on this appeal.

1st. He questions the jurisdiction of the United States District Court to render justice in accordance with the Act of Congress on a very technical ground, to wit, that a finding that defendant Laird sustained two distinct injuries long ago became final, *i.e.,* in the original awards. [Tr. 3-4, 22-27, 46-50.]

2nd. He questions the power of the Courts to hold that a finding of fact by the Commissioner has resulted in an award "not in accordance with law," under 33 U. S. C. A. 921.

3rd. He contends that the Act of Congress should be construed to mean that the employee's maximum recovery is unlimited, except that he cannot recover more than $7,500.00 from each employer.

4th. He contends that where two separate accidents result in a disabling condition, the second trauma aggravating the condition created by the first, the law does not compel any apportionment of the liability between the employers for whom the work was being done at the time of the accidents.

Law.

A brief discussion of the law is indicated before appellant's points are separately analyzed.

Section 914(m), 33 U. S. C. A., as it stood at the time of the accidents and awards here involved reads as follows [Tr. 4, Part IV]:

> "914(m). The total amount payable under this Act for injury or death shall in no event exceed the sum of $7500.00."

Prior to the decision of Judge Lewis Goodman, in this case, said section had not been authoritatively construed or applied by a Federal Court. [Tr. 8-13.]

Appellees contend that said section is unambiguous and is capable of only one construction. Due effect must be given to each and every clause thereof.

> *United States v. Wiltberger* (1820), 5 Wheat. 76, 99, 5 L. Ed. 37 (clear meaning);
>
> *Adams v. Woods* (1805), 2 Cranch. 336, 2 L. Ed. 297 (effect to every part of Statute);
>
> *Calif. v. Deseret Water Co.* (1917), 243 U. S. 415, 420, 61 L. Ed. 821.

In applying such a distinctly worded section, the Courts will ever keep in mind the obvious intent of the legislative body.

> *Waskey v. Hammer* (1912), 223 U. S. 85, 94-95, 46 L. Ed. 359;
>
> *P. R. Ry. Co. v. Mor* (1920), 253 U. S. 345, 64 L. Ed. 944.

What does it say? If unambiguous, it surely "means what it says, and says what it means."

It starts off: *The total amount payable under this act. Total* certainly means the absolute maximum. *Payable* certainly means *by the employer and to the employee,* in the absence of either qualifying expression.

The next phrase: *for injury or death,* has been authoritatively construed to mean *for either injury or death but not for both,* so that where both occur the maximum for

either is $7,500.00 but if both occur, a theoretical maximum of $15,000.00 is established.

> *Intl. Merc. Marine Co. v. Lowe* (C. C. A. 2d, 1938), 93 F. 2d 663 (actual total awards $13,500.00);
>
> *Norton v. Travelers Ins. Co.* (C. C. A. 3rd, 1939), 105 F. 2d 122.

The third phrase is significant: *shall in no event exceed $7,500.00.* If it is conceivable that some injury or death may result in an award in excess of $7,500.00, then the words *in no event* must be regarded as stricken from the statute and rendered meaningless. It does not say *shall usually* not exceed $7,500.00; it says *in no event. In no event* means *never.* It means *absolutely never,* or else it is a contradiction in terms.

Two Injuries.

A clever approach, used by the Government, is to admit all the above, but to contend that here there were *two injuries.* The second accident aggravated the prior condition, or in the Commissioner's own words:

> "Said strain aggravated and increased disability from which claimant was already suffering in his back, consisting of an incipient herniation of a nucleus pulposus of the lower spinal column which had sustained by injury of December 2nd, 1942 * * *." [Tr. 48, Cf. Tr. 24.]

Now, if this second strain or trauma was a new injury, within the meaning of the Act, then one of two alternatives should govern:

(1) Either the first employer should be off the hook completely, since his "injury" obviously didn't cause the second disability; or

(2) It should be regarded as a *second injury* regardless of the number of employers involved. For surely, it cannot be a *second injury* merely because the employee has changed jobs!

However, the uniform practice in the Workmen's Compensation field has been to *apportion liability* when two or more employers are involved and separate accidents have resulted in a single condition, the later accident having *aggravated the condition caused by the earlier.*

3 Schneider's Workmen's Compensation (1943), p. 514;

Hanna, I. A. C. Practice & Proc. (1943), p. 389;

O'Brien v. Albrecht Co. (1919), 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1257 (aggravation of hernia);

Weaver v. Maxwell Motor Co. (1915), 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B 1276 (loss of one remaining eye, held only a partial disability);

White v. Taylor (La. App., 1941), 5 So. 2d 337;

Empl. Cas. Co. v. U. S. F. & G. Co. (Ark., 1949), 214 S. W. 2d 774;

Blanchard v. I. A. C. (1924), 68 Cal. App. 65, 228 Pac. 350 (industrial disease, 3 employers);

Assoc. Indem. Corp. v. I. A. C. (1932), 124 Cal. App. 378, 12 P. 2d 1075 (occupational disease);

Rubattino v. I. A. C. (1944), 65 Cal. App. 2d 288, 150 P. 2d 538 (occupational disease);

24 American Law Reports, p. 1467, Note;

39 American Law Reports, p. 1276, Note.

In Federal practice this rule is recognized. *Apportionment of the weekly indemnity was ordered in this very case on that ground.* [Tr. 24, 48.]

If the aggravation here had occurred after the employee had returned to work for the *same employer,* we take it that there would be no argument about *two injuries* or in favor of double liability. Common sense and case law unite in revolt against any such absurdity, and the Government concedes the point. (Brief for Appellant, p. 16.)

Lumberman's Mutual etc. v. Locke (C. C. A. 2d, 1932), 60 F. 2d 35, 37.

The Government argues that if each employer knows he has a limit of $7,500.00, that's enough.

But why should there be a distinction in favor of an employee with multiple employers, a discrimination in his favor as against the employee with a single employer? Is that what Congress wanted?

Compare:

(1) *A* works for *B*. *A's* back is injured. Four weeks later *A* returns to work. One month later a new accident aggravates the back condition and produces total disability. One employer, clear limit $7,500.00.

(2) Same facts, but when *A* goes back to work after first accident, he works for *C* instead of *B*. Two employers, therefore (says Government) limit $15,000.00.

We know that the best and most worthy employees will remain longer with a single employer. By what form of logic should the Government discriminate in favor of the employees who shift employment most frequently?

And what will the Commissioner rule in a case where the two employers have a single insurance carrier?

Won't the practical result be that no insurance carrier will allow an employer to hire an employee who has any residual condition from a prior accident which might be aggravated by some new strain, because such "aggravation" would result in double liability, perhaps for the same insurance company?

Purpose of Act.

In this case all parties freely admit that Section 914(m) was enacted for the benefit of the employer class—not for the benefit of the employees. (Cf. Brief for Appellant, p. 16.) Since liberal construction is the rule applicable to the Longshoremen's Act (Cf. Brief for Appellant, p. 24), it must be conceded that the section should be broadly, fairly and liberally construed and applied *to carry out the intent of Congress, i.e.,* to protect the employer class and not to extend the benefits of employees, *which would defeat the Congressional intent.* Other provisos of the law, designed for the employees' benefit should be correspondingly treated to fully effect the intent of Congress to benefit injured servants. Congress, in abolishing the common-law defenses of the employer and in substituting bureaucratic determination of liability for the age-old jury trial

methods, gave the employers one and only one new benefit, *limited liability*. This latter statement is recognized as being true of nearly all Workmen's Compensation Acts.

> 1 Campbell on Workmen's Compensation (1935), p. 28;
>
> *Costanzas v. Com. Canners,* 51 Ont. L. Rep. 166, 11 Brit. Rul. Cases 982;
>
> 27 Cal. Jur. 259, Work. Comp., Secs. 2 to 4;
>
> 28 R. C. L. 713, Work. Comp. Acts, Sec. 2;
>
> Hanna, I. A. C. Practice & Procedure (1943), pp. 8-14.

It is at once apparent that if this one small crumb tossed to employers is to be construed liberally *in favor of employees,* as the Government contends (Brief for Appellant, p. 23), the Courts will in effect abandon the enlightened doctrine of trying to carry out legislative design in favor of the now disgraced doctrine of *Strict Construction,* a doctrine which originated in the hearts of common law judges who tried to soften the rigors of an inhumane criminal law system.

The only way that Section 914(m) can be liberally construed in favor of employees is to strictly or narrowly construe it against employers. That would be tantamount to a judicial conspiracy to defeat the unquestionable intent of the Congress of the United States. That such a request should be boldly made in the Government's brief is, to say the least, very surprising.

New York Precedents.

The Act of Congress was based on the New York statute. Hence, the cases of the courts of that state are valuable tools to the Federal judiciary.

Case v. Pillsbury (C. C. A. 9th, 1945), 145 F. 2d 392;

Kobilkin v. Pillsbury (C. C. A. 9th, 1939), 103 F. 2d 667;

West Pa. Co. v. Norton (C. C. A. 3rd, 1938), 95 F. 2d 498.

Apportionment of liability between employers, where a condition is aggravated while working for a second master, is the standard New York rule.

Anderson v. Babcock & Wilcox Co. (1931), 256 N. Y. 146, 175 N. E. 654 (second fracture of pelvis);

Cox v. Roosevelt Hosp. (1937), 298 N. Y. Supp. 799;

Mazoreh v. Rochester Co. (1938), 4 N. Y. S. 2d 249.

Obsta Principiis.

The trial court also considered the basic common law maxim, *obsta principiis,* Resist Beginnings.

Boyd v. United States (1886), 116 U. S. 616, 635, 29 L. Ed. 746, 6 S. Ct. 524.

If the Government can sap and mine at the foundations of Section 913(m), as here attempted, they can soon cause its complete collapse. Soon they will argue that the *Locke* case, 60 F. 2d 35, should be ignored and that the principle

of double and multiple liability should be as valid against a single employer as against multiple employers.

No doubt, also, they may soon argue that *partners* and *joint enterprisers* are *severally liable* each for the statutory maximum even in the case of a single accident, because they will have read into the law that dangerous phrase "by each employer," and they will argue that each partner is an employer. They will contend that such doctrine is required by Liberal Construction, since it would benefit the employee.

It is respectfully submitted that all the principles of sound and liberal construction require that the decision of the trial court's view be upheld, and in this connection we cite the leading cases considered by the trial court.

Denn v. Reid, 10 Pet. 524, 9 L. Ed. 519;

Heydon's case (1584), 3 Coke 7A, 14 Eng. Ruling Case 816;

Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257;

Ross v. Doe, 1 Pet. 665, 7 L. Ed. 302.

We now proceed to answer the Appellant's arguments, *seriatim.*

1. Difficulty re Jurisdiction.

The Government contends that the Federal Courts lack any jurisdiction over this problem because of an asserted finding by the appellant Commissioner that there were *two separate injuries.*

Even the facts as recited in the opening brief of appellant show how absurd is this purported difficulty.

It is respectfully submitted that, as above pointed out, the Commissioner distinctly found that the residual condi-

tion caused by the first accident was aggravated by the second accident, resulting in a single, continuing disability, for which liability was apportioned. [Tr. 24, 26, 48, 50.]

There was no finding of two injuries. The Commissioner's language in the 1942 findings was singular, not plural. *E.g.:*

> "That as a result of his *injury* sustained claimant was wholly disabled * * *.
>
> From June 16 claimant has been wholly disabled indefinitely by reason of said *injury.* * * *" (Italics supplied.) [Tr. 50; cf. Tr. 24.]

Medical expenses, which were superadded to the $7,500.00 paid out, were awarded on a 50-50 basis against the two employers. [Tr. 26, 48.]

This is wholly dissimilar from a case where an accident at one employer's place of business results in loss of two fingers of the right hand, and a second accident thereafter disables the left foot, at another employer's factory. *Such are clearly separate injuries resulting from separate accidents.*

This case is universally regarded as a case of a *single injury resulting from separate accidents* and requiring apportionment of liability.

2. Review of Finding of Fact.

The second point of Appellant's truly falls by its own weight, or lack of weight. He contends his nonexistent finding of two injuries is not reviewable because it is supported by substantial evidence.

He fails to cite any transcript reference to such a finding or to any evidence which could support such a finding.

An *injury* is, of course, the damage, condition or hurt suffered by the employee, just as *death* is a condition resulting from the accident. The terms *accident* and *injury* as not used synonymously.

> *Grain Handling Co. v. McManigal* (C. C. A. 2d, 1939), 102 F. 2d 464.

If *injury* means *accident,* then consistency would require the term *death* in Section 914(m) to be held to be limited to cases where *death* resulted immediately from an event in the course of employment, rather than *death resulting from any accident which occurs in employment.* Such construction would be absurd. See *Intl. Mer. Mar. Co. v. Lowe* (C. C. A. 2d, 1938), 93 F. 2d 663, which held that where a single accident results in a disabling injury for which the employee draws $6,000 at $25.00 a week, and then dies, as a result of the same original accident, a new award of $7,500 for the death may issue.

In the instant case, if the two accidents resulted in separate injuries, it would be unconstitutional to hold the first employer partially responsible for the damage resulting from the second accident. Suppose, *A* lost his right hand while working for *B,* and obtained an award therefor. Later *A* worked for *C* and in a new accident became 100% disabled. Could a Court uphold a new award of $7,500 against *B* on the theory that if *A* still had his right hand, he might not be 100% disabled? It was the duty of the trial court to construe the law so as not to render it in conflict with the Constitution by depriving any person of property without due process of law.

> *U. S. v. Jin Fuey Moy,* 241 U. S. 394, 60 L. Ed. 1061, 36 S. Ct. 658.

The term *injury* is, of course, defined in Section 902(2) of 33 U. S. Code. It means an accidental injury arising out of and in the course of employment.

Therefore, unless it means the physical condition produced by accidental means (which, here, is admittedly singular, not plural), then there is no basis at all for apportioning the award and holding the first employer partially responsible for the total disability which followed the second accident. *No one can contend that the second accident occurred in the course of the first employment.* Therefore, if *accident* means *injury,* the *second injury* was not in the course of the first employment. The law grants compensation only in case of injury in the course of employment, as is clear from a reading of Section 903(a) with 902(2).

Here, the two accidents operated jointly to cause a single total disability, *or so the Appellant Commissioner found.* [Tr. 25, 49.] The original accident, alone, had only caused eight (8) days of temporary total disability, which cost the employer only $28.57. [Tr. 24.] Then the employee returned to work, *and worked* for a full month. [Tr. 24.]

Clearly the only factual basis for holding the first employer liable at all is that the *present injury,* which resulted in continuing total disability, was caused jointly (1) by the condition remaining from the first trauma and (2) by the accident five weeks following the first trauma. These produced a single injury described medically as a rupture or herniation of the nucleus pulposus.

3. Section 914(m) as Employer's Provision.

We have already treated fully in our argument, the meaning and effect of Section 914(m), 33 U. S. Code.

We add that Appellant's distinction between Section 8(a) and (6) of the Act, 33 U. S. C. 918 (Brief, pp. 14-15) is mere sophistry. What need is there to limit the number of weeks in Section 918, when Section 914 places an overall limit of $7,500.00? Is Congress to presume that deputy commissioners cannot divide $7,500.00 by $25.00 and determine the number of weeks by themselves without legislative aid?

If each accident resulted in a separate injury, we ask, why did not the employee have a right to $50.00 a week? Obviously, because the injury had two sources, and if more than one employer were to be held at all, the liability had to be divided. The one injury concept is illustrated by the single operation, cost of which was divided. [Tr. 48.]

We again emphasize that if both these accidents had occurred while in the employ of the same employer, everyone would agree it was one injury with one $7,500.00 maximum. How absurd it is to multiply the benefits of the employee by the number of his employers, and thus put a premium on not holding a steady job!

4. Anti-Apportionment Doctrine.

The last point made by Appellant is that separate maximum awards for separate injuries from separate accidents while employed by separate employers are justified.

With such a generalization little fault can be found. But how can two separate accidents each result independently in total permanent disability?

Or how can two separate accidents each result in two separate deaths? For if the Commissioner's argument be sound, if the employee here, after obtaining the two separate $12.50 per week awards, had died as a result of the injury (or injuries), his widow would be entitled to two separate $7,500.00 death awards, as death in each case, it would be argued, resulted from a separate injury!

No doubt the two employers, in case of such death, would be jointly liable for the death, and would have to pay $7,500.00 total, as in the case of *Intl. Merc. Marine Co. v. Lowe* (C. C. A. 2d, 1938), 93 F. 2d 663, 115 A. L. R. 896.

It is respectfully submitted that a single back condition, resulting from two independent traumatic events, can no more result in two separate injuries than it can result in two separate deaths.

The Appellant's anti-apportionment doctrine should be completely repudiated. His inability to find any precedent (Brief of Appellant, p. 19) results merely from his ignoring all cases of apportionment.

Statutory Recognition.

The statute itself recognizes the Apportionment Doctrine. 33 U. S. C. A. 908(f) reads, in part, as follows:

> "(f) Injury increasing disability. (1) In case an employee receive an injury which of itself would cause only permanent partial disability but which, combined wtih a previous disability, does in fact cause permanent total disability, *the employer shall provide*

compensation only for the disability caused by the subsequent injury; * * *"

See:

Nat. H. H. Assn. v. Britton (1945), 147 F. 2d 561.

It is thus clear that in this case the second employer could in no event have been held liable for $7,500.00, or full permanent disability as long as the Commissioner found that there was a previous disability which contributed substantially to the total disability. The Commissioner now attempts to do by indirection what the statute expressly forbids.

New York Rule.

We have already cited *supra* several New York cases recognizing the apportionment doctrine. Appellant has cited one New York case which he contends is against apportionment. (Brief for Appellant, p. 20.)

We are unaware of the source of Appellant's knowledge of the facts of the case of *Berner v. Caruso* (1922), 233 N. Y. 614, 135 N. E. 941, s. c. 201 App. Div. 866. The reported memoranda decisions give no such facts. The facts, as we gather them were that an employee obtained a lump sum settlement in 1917, as for a total disability. If divided on a weekly basis, the sum would have covered the period through March of 1924. However, the "gold cure" worked and he recovered sufficiently to return to work. In July, 1920, he was again the victim of an industrial accident. He got a new award, which the Courts

upheld. *There are no facts reported which indicate that the residual condition from the first accident was a part of the causation of the disability which followed the second accident.* It was, therefore, not a case which required apportionment. *There is not one word in the memoranda against the theory of apportionment where a later accident aggravates an earlier disability.*

Wherefore, appellees submit that the judgment below should be affirmed.

Respectfully submitted,

TIPTON & WEINGAND,

CLAUDE F. WEINGAND,

Attorneys for Appellees.

No. 12,396

United States Court of Appeals For the Ninth Circuit

Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, *Appellant,*	
vs.	
Liberty Mutual Insurance Company, et al., *Appellees.*	

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

March 20, 1950

Frank J. Hennessy,
United States Attorney,
Macklin Fleming,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

Ward E. Boote,
Chief Counsel, Bureau of Employees' Compensation,
Federal Security Agency, Washington, D. C.,
Herbert P. Miller,
Assistant Chief Counsel,
Of Counsel.

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March 20, 1950

THE ISSUE.

The sole substantive question in this cause is: how long shall the compensation benefits for total disability of $25 per week last? We contend that where, as a result of two injuries occurring in separate employments, there are two employers liable for workmen's compensation, the weekly payments of $12.50

each continue during the period of total disability until the full liability of each employer has been exhausted.

REVIEW OF ARGUMENT.

We argued in our opening brief that the Longshoremen's Act contemplated the receipt of $25 per week by the totally disabled employee during the continuance of his total disability, and that this compensation ceases only when the liability of the employer has been exhausted by the limitations of Section 14(m) of the Act (prior to amendment in 1948). We argued that a proper interpretation of Section 14(m) related it to a limitation of liability of the employer, and not to any limitation of benefits receivable by an employee; that each injury may create an independent basis for liability for each employer so as to extend the duration of time during which the totally disabled employee is protected.

Just as, for example, particular words of inheritance in an estate may be held to be words of purchase and not words of limitation, so in this matter Section 14(m) must be held to relate to compensation *payable* by the employer, and not to compensation *receivable* by the employee.

APPELLEES' OBJECTIONS.

Appellees have submitted rebuttal material to our main arguments and have also raised the following general considerations:

(1) The deputy commissioner rejected the doctrine of apportionment.

(2) Injustices may arise because an employee with multiple employers may obtain greater compensation than an employee with a single employer.

(3) This court should resist all attempts by the government to sap and mine at the foundations of limited liability.

We will not rework our arguments in chief, but merely reply to these general considerations raised by appellees:

I.

IN FIXING PAYMENTS AT $12.50 PER WEEK FOR EACH EMPLOYER THE DEPUTY COMMISSIONER GAVE FULL RECOGNITION TO THE NEED FOR APPORTIONMENT.

We have no quarrel with the principle of apportionment, nor do we believe the deputy commissioner failed to apply the doctrine. In point of fact, in these cases by one order he awarded the sum of $12.50 per week to claimant for injury in the employment of appellee, Contractors, Pacific Naval Air Bases, and by a second order he awarded the sum of $12.50 per week to claimant for injury in the employ of appellee, Builders, Pearl Harbor Dry Dock No. 4. It is difficult

to see how the doctrine of apportionment could be adhered to more scrupulously. No claim has been made that claimant is entitled to $50 per week. The issue here is whether the $12.50 per week payment of, for example, appellee, Contractors, Pacific Naval Air Bases, should cease when Contractors, Pacific Naval Air Bases has paid out only $3,750. The only justification for such cessation in view of the continuing total disability of the claimant is that other sums were paid out by another employer. We maintain that the limitation of "compensation payable" set forth by Section 14(m) to the sum of $7,500 means what it says, and that until that sum has been paid out by an employer the section has no application to terminate benefits receivable by an employee for continuing total disability.

II.

HYPOTHETICAL DISCRIMINATION AGAINST PERSONS UNKNOWN IS NOT A PROPER SUBJECT FOR A COURT TO CONSIDER IN INTERPRETING A COMPENSATION STATUTE. THIS COURT CONSIDERS FACTS AND NOT HYPOTHESES.

Appellees vigorously argue that the continuance of compensation of $25 per week to Laird during the period of his total disability, until the liability of both of his employers has been used up, would be a discrimination against persons unknown who are apt to be the best and most worthy of employees. We readily concede that under no system of compensation is it possible to produce uniform and complete equal-

ity among all claimants, and under no system of law is it possible to eliminate all distinctions and inequalities. Appellees have suggested an example under which an employee with multiple employers would receive more compensation than an employee with a single employer. It is easy to cite other cases of inequality:

(1) A is self-employed. He is injured. No compensation.

(2) A is employed by an employer subject to employees' compensation. He is injured. A receives employees' compensation.

(3) A, during the course of his employment, is injured by the negligent driving of a vehicle owned by a third-party corporation. A receives workmen's compensation and $100,000 damages.

The rain falls on the just and the unjust, and it is no argument against a compensation system that it does not succeed in every respect in eliminating the element of chance from the hazards of life.

The sole question at issue here is whether an employer may terminate the duration of his liability prematurely because there has been more than one injury. It is difficult to see how there can be a valid claim of discrimination based on the fact that a totally disabled claimant may have the duration of his compensation extended for a longer period than might be the case under circumstances of single employment and single injury.

III.

IT IS IN THE NATURE OF STATUTORY INTERPRETATION THAT NOVEL QUESTIONS ARE CONTINUALLY ARISING WHOSE ANSWERS DEPEND ON LOGIC AND NOT ON PRECEDENT.

Appellees' final point is in the nature of *stare decisis,* or as they have expressed it in their brief, *obsta principiis.* As we understand the argument advanced by appellees, the court should resist change and be guided largely by precedent; otherwise, state appellees, continued sapping and mining at the foundations of Section 14(m) by the government would soon cause its complete collapse. (Brief for Appellees, 10-11.) We do not see the relevancy of this argument in view of the fact that the law was amended two years ago to specifically provide for indefinite employers' liability in cases of permanent total disability. But apart from this answer, we think it fundamental in law that a court cannot be guided by maxims or phrases of suitable age and respectability but must apply its own intelligence to the law and facts. It is to be expected that direct and specific precedents for each particular application of a statute are not available, and it would be a stultifying argument indeed to suggest that a court should reject an interpretation of the law because it had never been previously advanced or judicially considered.

In this aspect, if the court finds Latin phrases helpful, we respectfully suggest that the appropriate maxim for this cause is found in Coke's Littleton 283b, *Qui haeret in litera haeret in cortice,* Who clings to the words clings to the skin. Or, as expressed by Lord Mansfield in *Fisher v. Prince*, 3 Burr. 1363,

"The reason and spirit of cases make law, and not the letter of particular precedents."

CONCLUSION.

The conclusions set forth in our opening brief are valid and the points cited by appellees, that no law has a complete and uniform equality, and that a particular application of a law in each first instance is unsupported by direct precedent, do not affect our conclusions that the deputy commissioner properly interpreted Section 14(m) as a provision relating to the liability of the employer and not to the compensation of the totally disabled employee and properly applied the limitation to separate injuries in separate employments.

The complaint should be dismissed.

Dated, San Francisco, California,
March 20, 1950.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

MACKLIN FLEMING,
Assistant United States Attorney,

Attorneys for Appellant.

WARD E. BOOTE,
Chief Counsel, Bureau of Employees' Compensation,
Federal Security Agency, Washington, D. C.,

HERBERT P. MILLER,
Assistant Chief Counsel,

Of Counsel.

No. 12396

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN H. PILLSBURY,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.,*

Appellees.

PETITION FOR REHEARING.

TIPTON & WEINGAND,
1220 Broadway Arcade Building, Los Angeles 13,
Attorneys for Appellees.

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WARREN H. PILLSBURY,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.,*

Appellees.

PETITION FOR REHEARING.

Come now the appellees and respectfully petition the court for a rehearing.

The Opinion of the Court was filed May 26, 1950.

This petition is filed under Rule 25 of this Court. In the judgment of counsel it is well founded and it is not interposed for delay.

Discussion of Opinion.

The opinion makes two basic errors, in counsel's opinion:

First, it misstates the appellees' contention as to the meaning of Section 14(m) of the Longshoremen's Act (33 U. S. C. 914m). The Court takes the appellant's view as to our position, rather than our own.

Second, it relies primarily on the *res judicata* basis, which is not apposite for many reasons.

I.

Appellees' Contention Is Misstated in Opinion and Our True View Is Not Mentioned by the Court.

The Court states appellees' contention to be that no employee may recover more than $7,500 under the law, no matter how many successive accidents or injuries or disabilities he suffers, using the example of an employee who recovered $7,500 for partial disability and later lost both legs after returning to employment. This mistake no doubt came from the Court's assumption that the Government had not misstated our position (see Brief for Appellant p. 23, par. 1).

Our point of view, as clearly stated in oral argument, is that the Act grants awards only for *disability* or death (33 U. S. C. 903a). No award is granted for mere injury or because of an accident. Hence, the word *injury* in 33 U. S. C. 914(m) must be read as "disability" or as "disability resulting from injury." Otherwise there is no statutory limit to awards for "disability" but only upon awards for death. A statute is to be construed so that it will not be rendered meaningless.

> *Market Co. v. Hoffman* (1879), 101 U. S. 112, 115, 25 L. Ed. 782.

The facts here disclose, as a matter of law, only one disability, caused by two successive accidents which occurred during two separate employments. The Commissioner so held and required the two employers to share the liability for the medical care [R. 27, 50] and for the maximum weekly benefit of $25.00 [R. 27, 50]. If there is more than one *disability* the Commissioner

should have given $50.00 a week award in this case, as the statutory limit on weekly award is clearly a limit on each disability (33 U. S. C. 906, see 10 F. C. A. p. 267, and Note, Supp. p. 45).

The Commissioner's refusal to terminate the weekly awards upon a showing that the $7,500 maximum had been paid [R. 37, 57] was an act in excess of his jurisdiction, if our contention is correct as to the meaning of 33 U. S. C. 914(m).

The Court's opinion as to the meaning of the section is fatally defective in that it inserts the word "employer" in the singular and in that it fails to distinguish between a *disability* and an *injury*. No award is ever made for *an injury,* only for a disability.

Here, the man's disability clearly resulted from a singular physical condition jointly caused by two accidents [R. 48].

We do not contend that if an employee, say Mr. Laird, has recovered the $7,500 maximum, and he returns to work for the same or another employer, he is without statutory protection. *No such point is involved in this case.* If Laird returned to work and lost a leg, he could get up to $7,500 more, under the law as it existed in 1942. If he had an accident which re-aggravated his back condition, resulting in a new disability period, he could doubtless recover a new award therefor. We have certainly not asked the Court to hold otherwise. Any contrary holding in this case would be pure *dictum.*

II.

Res Judicata Rule Was Not Properly Raised and Is Clearly Inapplicable.

The opinion of the Court states that the 1942 awards are *res judicata*. No authority was cited by the Court for this holding.

Appellant did not raise any issue of res judicata in the 1948 hearing before himself as Commissioner. The orders denying termination of the awards were not based upon any such issue [R. 37-39, 57-59].

Moreover, no such issue was raised in the District Court [R. 6, 7]. Although the Points and Authorities filed by the Government in the trial court are not in the record, we have carefully reread them without finding any such point, except an incidental reference that the awards for "medical treatment" had long since become final [Reply Memo p. 3, line 21]. The trial judge's opinion, of course, does not deal with any such issue [R. 8-13].

The point was thus raised for the first time on appeal. It is elementary that such tardiness is fatal to the point:

> *Holmgren v. U. S.* (1910), 217 U. S. 509, 521, 30 S. Ct. 588, 54 L. Ed. 891, 19 Ann. Cas. 778;
>
> *Evenson v. Spaulding* (C. C. A. 9th 1907), 150 Fed. 517, 523, 9 L. R. A. (N. S.) 904;
>
> *Geo. R. Co. v. Redwine,* 85 Fed. Supp. 749.

Judgment Beyond Jurisdiction Never Becomes Res Judicata.

If the earlier awards could be construed to have covered the issue of maximum liability, they could never become *res judicata* because they would be in excess of jurisdiction. The Commissioner does not sit as a common law court of general jurisdiction with unlimited amounts to dispose of in his judgment.

> *St. Jos. Stockyards v. U. S.* (1936), 298 U. S. 38, 56, 80 L .Ed. 1033;
>
> *Boundary County v. Wolden* (C. C. A. 9th 1944), 144 F. 2d 17, 19.

If a California Municipal Court rendered a judgment for $5,000, which was not appealed, could it be held to be *res judicata,* in view of the statutory limit of $3,000?

Any administrative order, or even a judicial decision, in excess of jurisdiction is void and never becomes *res judicata.*

> *Piedmont Ry. Co. v. U. S.* (1930), 280 U. S. 469, 478, 74 L. Ed. 551;
>
> *Hardin v. Jordan* (1891), 140 U. S. 371, 400, 35 L. Ed. 428;
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>
> *St. Louis Co. v. Paramount Pictures* (D. C. Mo. 1945), 61 Fed. Supp. 854; app. dism. 156 F. 2d 400; cert. den. 335 U. S. 854.

Res Judicata Applies Only to Issues Decided.

The 1942 awards in this case cannot be regarded as determinative of the question of the $7,500 maximum because that issue was not raised or involved [R. 22-27, 46-50]. Those original awards were merely for $12.50 per week "until the further order of the Deputy Commissioner" [R. 27, 50].

The termination because of having reached the $7,500 maximum was thus left open. The Commissioner treated the issue as open in the 1948 hearing and decision.

> *Gage v. Guner* (1902), 136 Cal. 338, 346-347, 68 Pac. 710.

Also:

> 42 *Am. Jur.,* Public Adm. Law, Sec. 176.

Indeed, if the 1942 awards are final on the issue, then the $12.50 per week will go on forever, unless the Commissioner decides to terminate on reaching $15,000, because the *original awards mention no limit!*

The only kind of 1942 award which could have been fairly regarded as determining this issue would be one which stated explicitly that each employer was regarded as under obligation to pay $12.50 per week up to $7,500 maximum for each employer, or until disability ceased, whichever first occurred.

> *Roch T. Co. v. U. S.* (1939), 307 U. S. 125, 143, 145, 83 L. Ed. 1147;
>
> Note, 122 *A. L. R.* 600, 602;
>
> *Ross v. Beacham* (D. C. S. Car.), 33 Fed. Supp. 3 ("precise question").

If the employers had gone to Court in 1942 on this issue, they would have been laughed out of Court. There would have been no exhaustion of the administrative remedies, since the order was subject to termination by its express terms [R. 27, 50].

42 *Am. Jur.* 580;

Empl. Liab. Corp. v. Matlock, 151 Kan. 293, 98 P. 2d 456, 127 A. L. R. 461.

An action in Court in 1942 would have been treated as fictitious, frivolous, and academic, since the disability might cease [R. 26-27] or the employee might die before the $7,500 joint limit would be reached. Hypothetical questions are not "cases or controversies" within the meaning of Article III of the U. S. Constitution.

Nashville Ry. v. Wallace (1933), 288 U. S. 249, 77 L. Ed. 730;

Elec. Co. v. S. E. C. (1938), 303 U. S. 419, 443, 82 L. Ed. 936, 115 A. L. R. 105;

Chicago Ry. Co. v. Wellman (1892), 143 U. S. 339, 36 L. Ed. 176.

Moreover, it would have been held that it would be presumed that the Commissioner would follow the law and issue an order of termination when the correct maximum was reached.

42 *Am. Jur.* 574;

Pac. Tel. Co. v. Seattle (1934), 291 U. S. 300, 304, 78 L. Ed. 810.

Again, if the 1942 awards are final *as to any issue,* are they not final as to the issues of *single disability* and of *apportionment of liability* for Mr. Laird's *disability?* For, those awards required these appellees to divide that liability 50-50 as for a single disability [R. 27, 50].

The basic principle of *Res Judicata* is to avoid litigation on issues already once determined.

> *C. I. R. v. Sunnan* (1948), 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715.

In this case if the first award is now construed retroactively to have covered the issue of whether the $7,500 maximum was to be joint or several, then the Court is encouraging needless litigation about hypothetical effects which administrative orders may have in the unforeseeable future. Thus *res judicata* would encourage litigation, instead of having the salutary effect of avoiding repetitious waste of public funds and time in redetermination of matters once fully settled on the merits.

An analogous case would be one in which a divorce decree awards $50 a month for support of a child "until further order of the court." If state law limits such awards to minor children, *is the husband under a duty to appeal at once to establish that the award will not be enforced when the maximum is reached* at the child's twenty-first birthday? Or would it not be "beyond the jurisdiction" of the Court to enforce the decree beyond the maximum? And is it not presumed that the Court would later obey the law and make a "further order" of termination when the jurisdictional limit is reached?

It seems obvious that an award of $50 a month "until further order" is not a passing on the issue of whether there is a maximum limit to the amount which can be collected.

> *Russell v. Place* (1876), 94 U. S. 606, 608, 24 L. Ed. 214 (S. C. Fed. Cas. No. 12,161).

Or, suppose, here, that appellees had stopped paying the award and gone to court testing the jurisdiction of appellant to enforce his award as *ultra vires?*

Danger to Commissioner's Power.

Indeed, if this Court's opinion should stand, there is grave danger that the Deputy Commissioner would lose all his power to modify awards, because his purported reservation of "until further order" will become a meaningless appendage to a final and conclusive judgment.

Moreover, as pointed out in the Brief for Appellees (p. 11), the claim of appellant was that the earlier finding was conclusive as to the question of a *single injury* versus *multiple injuries.* We challenged the appellant to cite any transcript reference where any such finding was located (Brief of Appellees p. 12). To date no such transcript reference has been produced. The Court's opinion, likewise, does not purport to cite or quote any such finding from the record. The answer, of course, is that there was no such determination, and this *res judicata* point is a last straw grabbed at by appellant, *for the first time on appeal, and without any reference to the record.*

The Court's attention is further directed to the fact that the Brief for Appellant raises the issue as one of jurisdiction of the District Court in San Francisco. The jurisdiction, conferred by statute, is indisputable. Even if the District Court had decided the case erroneously *because the Government failed to plead res judicata,* the court below would still have had jurisdiction. And even if *res judicata* had been pleaded, it would have been meaningless for the reasons already stated: if $7,500 is the true jurisdictional limit on the commission, any purported award in excess thereof would be void and could never become *res judicata;* if, on the other hand, $7,500 is not the true limit, then the order sought to be enjoined would be valid. In other words, this case could not be disposed of except

by deciding the merits, and the merits would completely control the case, without any necessity of going further into the unraised issue of *res judicata.*

Conclusion.

It is respectfully submitted that a rehearing is indicated in this matter on the many grounds above argued, and particularly because

(1) the opinion inadvertently mistakes appellees' contentions, and fails to deal with appellees' actual position in the matter;

(2) the opinion overlooks the fact that *res judicata* was not raised until the appellate stage;

(3) the opinion fails to cite any precedents on *res judicata* and appears to be out of harmony with the established case law that a decision beyond jurisdictional limits is void and never becomes *res judicata,* that one *res judicata* rule applies only to issues decided in the earlier case, that the form of the earlier awards left the duration of the payments open to "further order," that the Commissioner passed on the issue as one which was still open to his control, and that any appeal to the courts in 1942 would have been obviously frivolous and hypothetical, since no one knew how long the disability would last or whether the employee would live long enough to collect the maximum award.

Wherefore, appellees pray for a rehearing and for an order affirming the judgment below.

Tipton & Weingand,
By Claude F. Weingand.
Attorneys for Appellees.

Certification.

We certify that the within petition for rehearing is, in our judgment, well founded and that it is not interposed for delay.

Tipton & Weingand,
By Claude F. Weingand.

No. 12,397

IN THE

United States Court of Appeals

For the Ninth Circuit

LAWRENCE DU VERNEY and SAMUEL N. LEWIS (alias Cecil Lewis),
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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No. 12,397

IN THE

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For the Ninth Circuit

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vs.

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the defendants, after a jury trial, of a violation of the Harrison Narcotic Act (26 U.S.C. 2553 and 2557), of a violation of the Jones-Miller Act (21 U.S.C. 174) and of a violation of the Conspiracy Statute (18 U.S.C. 371).

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. 1291.

STATEMENT OF THE CASE.

The appellants were indicted in the United States District Court for the Northern District of California in an indictment in three counts, the first count charging a violation of the Harrison Narcotic Act, the second count charging a violation of the Jones-Miller Act, and the third count charging a conspiracy to violate these Acts. After a trial by jury the appellants were found guilty on all counts. The appellant Lawrence Du Verney was sentenced to imprisonment for a period of fifteen (15) years and to pay a fine of Two Thousand Dollars ($2,000), the said sentence being imposed as follows: Imprisonment for a period of five (5) years on the first count of the indictment, imprisonment for a period of ten (10) years and a fine of Two Thousand Dollars ($2,000) on the second count of the indictment, imprisonment for a period of five (5) years on the third count of the indictment, terms of imprisonment on the first and second counts of the indictment to run consecutively, and the term of imprisonment on the third count of the indictment to run concurrently with the terms of imprisonment on the first and second counts of the indictment (Tr. 42-43). The appellant Samuel N. Lewis, also known as Cecil Lewis, was sentenced to imprisonment for a period of five (5) years and to pay a fine of Five Hundred Dollars ($500), the said sentence being imposed as follows: Imprisonment for a period of five (5) years on the first count of the indictment, imprisonment for a period of five (5) years and to pay a fine of Five Hundred Dollars ($500) on the second count

of the indictment, and imprisonment for a period of five (5) years on the third count of the indictment, terms of imprisonment to run concurrently (Tr. 43).

The three counts of the indictment, of which appellants stand convicted, read as follows:

"FIRST COUNT: (Harrison Narcotic Act, 26 U.S.C. 2553 and 2557)

The Grand Jury charges: THAT
LAWRENCE DU VERNEY, and
CECIL LEWIS,

(whose full and true names are, and the full and true name of each of whom is, other than hereinabove stated, to said Grand Jury unknown, hereinafter called 'said defendants'), on or about the 3rd day of August, 1949, in the City and County of San Francisco, State and Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one envelope containing a total of approximately 110 grains of heroin.

SECOND COUNT: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: THAT

At the time and place mentioned in the first count of this indictment, within said Division and District, said defendants fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quan-

tity particularly described as one envelope containing a total of approximately 110 grains of heroin, and the said heroin had been imported into the United States of America, contrary to law as said defendants then and there knew.

THIRD COUNT: (Conspiracy, 18 U.S.C. 371)

The Grand Jury further charges: That

The said defendants, at a time and place to said Grand Jury unknown, did feloniously conspire together and with other persons whose names are to said Grand Jury unknown, to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violation of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendants then and there well knew, in violation of Section 174 of Title 21 United States Code; that thereafter and during the existence of said conspiracy one or both of said defendants, hereinafter mentioned by name, in the City and County of San Francisco, State and Northern District of California, did the following acts in furtherance thereof and to effect the objects of the conspiracy aforesaid:

(1) On August 3, 1949, the defendant Lawrence Du Verney drove Federal Narcotic Agents Elmore P. Gross and James Mulgannon in a 1949 Cadillac Sedan, License No. Cal. 25 A 9390, from the vicinity of 920 Van Ness Avenue to the vicinity of the Edison Hotel, 1540 Ellis Street.

(2) On August 3, 1949, in the Edison Hotel, at 1540 Ellis Street, the said defendant Cecil Lewis handed one envelope containing a total of approximately 110 grains of heroin to the said Federal Narcotic Agent Elmore P. Gross." (Tr. 1-4.)

THE HARRISON NARCOTIC ACT.

The Harrison Narcotic Act, under which the appellants are charged in the first count of the indictment, reads in pertinent portion as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax." (26 U.S.C. 2553 (a)).

THE JONES-MILLER ACT.

The Jones-Miller Act, under which the appellants are charged in the second count of the indictment, reads in pertinent portion as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United

States or any territory under its control or jurisdiction contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U.S.C. 174.)

THE CONSPIRACY STATUTE.

The Conspiracy Statute, under which the appellants are charged in the third count of the indictment, reads in pertinent portion as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy", each shall be punished as provided by law.

FACTS OF THE CASE.

The undisputed facts are, briefly, as follows:

The appellant, Lewis, was introduced at the Hotel Edison, 1540 Ellis Street, San Francisco, California, where he was working as a bartender, by an informer to an undercover operative, Federal Narcotic Agent Elmore P. Gross (Tr. 68, 229). A dinner party was arranged for the evening of August 2, 1949, at the restaurant in the Hotel Edison, at which time Lewis was to introduce the appellant, Du Verney, to Agent Gross (Tr. 70, 233). On the evening of August 2, 1949, at the dinner party, in which another undercover operative, Federal Narcotic Agent James Mulgannon, was present, Lewis introduced agent Gross to Du Verney (Tr. 72, 150, 233). During the dinner, agent Gross and Du Verney left the table and had a conversation at the nearby bar adjacent to the dining room (Tr. 72, 150, 262). After dinner and between 10:00 and 10:45 P.M., agents Gross, Mulgannon and the informer left the hotel together (Tr. 163, 235). Early next morning at about 1:30 A.M., agent Gross, while at his residence at 920 Van Ness Avenue in San Francisco, had a telephone conversation with Du Verney (Tr. 77, 152). Shortly thereafter and between 1:45 and 2:00 A.M., Du Verney, accompanied by a young woman, drove his Cadillac automobile to the vicinity of 920 Van Ness Avenue, where agents Gross and Mulgannon, at Du Verney's invitation, entered the said automobile (Tr. 152, 265). Subsequently, after letting the young woman out of the car, Du Verney drove with agents Gross and Mulgannon to the immediate vicinity of the Hotel

Edison, and while enroute had a conversation with the agents (Tr. 80, 155, 156, 266, 267). Du Verney then left the Cadillac automobile, returning in approximately 45 minutes, where he had another conversation with the agents (Tr. 81, 157, 267-268). Thereupon agents Gross and Mulgannon entered the lobby of the Hotel Edison where agent Gross met Lewis and had a conversation with him (Tr. 82-83, 158, 237-238). Lewis then handed a package containing heroin to agent Gross, who, in turn, gave Lewis $225.00 (Tr. 83-84, 237-238). A warrant was issued on August 5 for Du Verney (Tr. 196), who left for Honolulu on August 6, some 7 or 8 days sooner than he had originally planned to leave (Tr. 286-287).

The disputed facts in this case are, briefly, as follows:

Agent Gross testified that he met Lewis but once prior to the dinner party (Tr. 68, 71); Lewis, corroborated by defense witness, Lawrence Mitchell Carter (Tr. 210), testified that there had been several such meetings (Tr. 231). Agent Gross testified that during the conversation at the bar, Du Verney agreed to sell him some narcotics and asked him for his 'phone number (Tr. 73); Du Verney testified that although narcotics were mentioned by Gross the discussion was primarily about gambling and girls and agent Gross gave him his 'phone number (Tr. 262). Agent Gross, corroborated by agent Mulgannon (Tr. 155-156), testified that in Du Verney's automobile, after the young woman had alighted, Du Verney agreed to sell the narcotics for $225.00 (Tr. 80-81); Du Verney denied

that he agreed to sell Gross narcotics but stated that the conversation was about his getting a girl for Gross (Tr. 266-267). Agent Gross, corroborated by agent Mulgannon (Tr. 156-157), testified that when Du Verney stopped his automobile in front of the Hotel Edison he left the car, entered the Hotel Edison, stayed there for a while, came out of the hotel and told agent Gross to go into the hotel and his man would take care of him (Tr. 80-81); Du Verney testified that he had not entered the hotel when he alighted from his Cadillac in front of the Hotel Edison, but entered the automobile of some friends who happened by, driving away with them, returning later to get into his car and letting agents Gross and Mulgannon out of his car, stating that he could not get any girls and that they owed him nothing (Tr. 267-269). Agent Gross, corroborated by agent Mulgannon (Tr. 308), testified that from the time the dinner party broke up at the Hotel Edison until the time of the meeting with Du Verney in front of 920 Van Ness Avenue, the informer was continuously with him and agent Mulgannon (Tr. 304-305); Lewis testified that not more than one hour after the dinner party broke up and the informer left the Hotel Edison with Agents Gross and Mulgannon, the informer returned to the hotel, gave him the package containing the narcotics, the contents of which were to him unknown, told him to give the package to agent Gross, that he inferred from the conversation of agent Gross that he should give the $225.00 which agent Gross had given him to the informer, and that a few days later he gave the money to the informer, none of

which he received for himself (Tr. 234-239). Agent Thomas E. McGuire of the Federal Bureau of Narcotics, corroborated in substance by agent Gross (Tr. 92), in testimony received in evidence against Lewis alone, stated that after his arrest, Lewis admitted that Du Verney had returned to the hotel after the dinner party and instructed him to give the narcotics to agent Gross and to get in return $225.00 from agent Gross, that he had given the narcotics to agent Gross, and that thereafter and around 4:00 o'clock in the morning he gave $200.00 of the money which he had received from Agent Gross to Du Verney and kept $25.00 for himself as his part of the transaction (Tr. 188-189).

It is, therefore, obvious that counsel for appellants has made a glaring mis-statement of the record in their opening brief, at pages 3 and 4, when he asserts as an undisputed fact that "Les", who in reality is a Government informer, but who counsel for appellants insists on calling an agent, left the package of narcotics with Lewis, directed him to give the package to agent Gross, who would call for it, and that Lewis gave the $225.00 which he had received from agent Gross to the said "Les".

CONTENTIONS OF APPELLANTS.

Appellants, in fourteen specifications of error, set forth in their opening brief, contend in substance that their convictions on all counts should be reversed on the following grounds:

I. The alleged erroneous instructions of the trial court in its charge to the jury (Specs. No. 1-7);

II. The alleged misconduct of the prosecution in questioning the appellants while on the stand (Spec. No. 1);

III. The alleged erroneous rulings of the trial court in admitting certain evidence and rejecting other evidence (Specs. 9-10);

IV. The alleged insufficiency of the evidence, and the alleged entrapment of the appellants (Specs. 11-14).

"SPECIFICATIONS OF ERROR."

These "fourteen specifications of error", in the language of counsel for appellants, are, as set out in the Topical Index of the opening brief, as follows:

1. "The Court erred in singling out the testimony of the defendants for close scrutiny";

2. "The Court erred when it instructed the jury that their task was ended if they were convinced of the truth of the testimony of the Government's witnesses";

3. "The Court erred in its instruction as to how the presumption that the witness was telling the truth could be negatived";

4. "The Court erred in its instructions with reference to an alleged informer";

5. "The Court erred in its instructions on entrapment";

6. "The Court erred in refusing defendants requested instruction on entrapment";

7. "The Court erred in refusing defendants requested instruction";

8. "The Court erred in permitting the prosecuting attorney, over objection, to cross-examine the defendant Du Verney as to other crimes";

9. "The Court erroneously allowed the witness for the Government to testify as to conversations out of the presence of the defendant Du Verney over objection of counsel";

10. "The Court erroneously sustained objections to questions propounded by the defendants";

11. "The evidence established entrapment to bar prosecution of the defendant, Samuel Neely Lewis";

12. "Insufficiency of the evidence to sustain the conviction of the defendant Lewis";

13. "Insufficiency to sustain the conviction of the defendant Lawrence Du Verney";

14. "Evidence established entrapment to bar prosecution of the defendant Lawrence Du Verney."

CONTENTIONS OF APPELLEE.

I. The trial court committed no error, prejudicial or otherwise, in charging the jury;

II. The prosecution acted properly in inquiring, on cross-examination, into the criminal record and background of the appellant, Du Verney, and the trial court acted properly in admitting this evidence and in its instructions to the jury in this regard;

III. The trial court correctly held certain evidence to be admissible and certain other evidence to be inadmissible;

IV. The evidence overwhelmingly supports the verdict of the jury and negates the defense of entrapment as a matter of law;

V. There is no reversible error in the record, assuming, arguendo, that there is any error at all.

ARGUMENT.

"*In an effort to spell out reversible error, the appellants have indulged in microscopic criticisms of the record below.*" (Italics supplied.)

Frederick v. United States (C.C.A. 9), 163 F. (2d) 536, 551.

These words are particularly appropriate in our case at bar, as is the following significant pronouncement which this Honorable Court made in the case of *Sue Hoo Chee v. United States,* 163 F. (2d) 551, at page 553:

> "We are moved to add that if it may be assumed that jurors are so unreliably fallible as appellant's argument indicates, then the jury system is little better than trial by ordeal. However, long application of the system has convinced legal philosophers and ordinary and great judges that twelve persons of average intelligence are not easily led from the substantial evidence of a case. When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own

particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes."

I.

THE TRIAL COURT COMMITTED NO ERROR, PREJUDICIAL OR OTHERWISE, IN CHARGING THE JURY.

In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.

In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, when he deems it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting on the evidence, by drawing their attention to the particulars which he thinks are important. He may even express his opinion on the facts providing he makes it clear to the jury that all matters are submitted to them for their ultimate determination.

> *Cuercin v. United States,* 289 U.S. 466, 469;
> *Frederick v. United States,* supra.

The appellants in their opening brief make seven assignments of error against the instructions which the trial Court gave in its charge to the jury. These complaints in substance are, that the trial Court erroneously singled out the testimony of the appellants for close scrutiny, gave unfair standards by which the

credibility of the appellants could be determined, erred in holding that the jury could convict if it believed the testimony of the Government witnesses, further erred in instructing the jury on the law of aiding and abetting, on the defense of entrapment, and on certain questions with relation to the alleged informer. On the basis of these complaints, appellants contend that the trial Court committed reversible error in its charge to the jury. That these complaints have no individual or collective merit will soon be clearly seen, although before discussing them, appellants believe it fitting to call attention to these words of this Honorable Court, in the case of *Stein v. United States,* 166 F. (2d) 851, at page 855:

> "It is claimed the Court erred in the giving of certain instructions and the refusal to give certain instructions requested by appellants. Some of the objections appear to be extremely technical and other objections are directed to a particular instruction isolated from the charge as given by the Court. We think the proper approach is to view the charge as a whole to determine whether or not the jury was properly and adequately instructed as to the law governing the case. We have followed that procedure here and careful consideration of the entire charge convinces us that the instructions given constituted a full, complete and adequate presentation of the law of the case to the jury."

Viewing the instructions as a whole (Tr. 316-334), it is obvious that the trial Court's charge to the jury was eminently fair and in accordance with the correct

rules of law, as were, as above indicated, the individual instructions.

In analyzing the individual complaints directed against the Court's instructions, attention is called to this pertinent portion of Rule 30 of the Federal Rules of Criminal Procedure:

> "* * * . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.",

as well as to this pronouncement of the Supreme Court of the United States, as set forth in the case of *United States v. Atkinson,* 297 U.S. 157, at page 159:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver v. Taylor,* 93 U.S. 46; *Allis v. United States,* 155 U.S. 117, 122, 123; *United States v. United States Fidelity & Guaranty Co.,* 236 U.S. 512, 529; *Guerini Stone Co. v. Carlin Construction Co.,* 248 U.S. 334, 348; *Pennsylvania R. Co. v. Minds,* 250 U.S. 368, 375; *Burns v. United States,* 274 U.S. 328, 336; see *Shannon v. Shaffer Oil & Refining Co.,* 51 F. (2d) 878, 880."

In calling attention to this foregoing rule, and pronouncement of the Supreme Court, appellee in nowise

concedes that any instruction of the trial Court was erroneous.

It is to be noted that since the appellants filed their opening brief, and on March 1, 1950, the trial Court, on motion of counsel for the appellee and over the objection of counsel for the appellants, after hearing and pursuant to Rule 39 (b) of the Federal Rules of Criminal Procedure and Rule 75 (h) of the Federal Rules of Civil Procedure, corrected a portion of the reporter's transcript and certified the same to this Honorable Court. Originally the reporter's transcript reflected, as counsel for the appellants set it forth, on page 4, lines 19 through 26 of their opening brief, that the trial Court had said the following in its charge to the jury:

> "You should consider in weighing the testimony of witness, the circumstance under which the witness testified, the demeanor of the witness on the stand, the intelligence of the witness, the relation to which the witness bears to the government or to the defendant. The manner in which the witness may be affected by your verdict, *and the extent to which the witness has counterfeited or conspired, shall be put to the side.*" (Italics supplied.)

The corrected language of this instruction, now certified to this Honorable Court, reads as follows:

> "You should consider, in weighing the testimony of witnesses, the circumstances under which the witness testified, the demeanor of the witness on the stand, the intelligence of the witness, the relation which the witness bears to the govern-

> ment or to the defendant, the manner in which the witness may be affected by your verdict, *and the extent to which the witness has been contradicted or corroborated by other testimony.*" (Italics supplied.) (Tr. 319, lines 13, 19, as corrected.)

It might also be noted that the reporter's transcript was also corrected to show the words "evidence as" in lieu of the word "evidences" (Tr. 319, line 5, as corrected). While this latter correction is of little moment, the former correction obviously clarifies an apparent confusion.

Appellee and appellants are in sharp disagreement as to which, if any, of the instructions of the trial Court warrant serious consideration. Appellee respectfully submits that the only instruction meriting a searching discussion is that instruction to which the appellants took exception during the trial, in which instruction the trial Court charged the jury that the presumption that a witness is telling the truth may be negatived, among other things, by evidence of his criminal record (Tr. 319, supra). Counsel for the appellants, however, attempts to set the issue at rest by merely asserting, in their opening brief, at page 9, that "the testimony of a witness can be impeached by evidence of previous crime only if the same was a felony". Counsel for appellants, however, fails to support this statement by a single authority, blithely bypassing the issue by further asserting that the "authorities are too numerous to be cited". Appellee will develop this issue at some length later in this argument, awaiting with interest to learn whether counsel

for the appellants, in their closing brief, will cite some of the "numerous" authorities to which he alludes.

It should be observed that the appellants now vigorously protest an instruction given by the trial Court that the presumption that a witness is telling the truth may also be negatived, among other things, by evidence as to his character or reputation (Tr. 319, supra). Inasmuch as the appellants took no exception to this instruction during the trial, they are in no position, in view of the authorities hereinabove cited, to complain before this Honorable Court. As a matter of fact, there was no evidence of character or reputation in the record, unless the unsavory picture which Du Verney painted of himself may be considered as such. This particular matter, too, will be discussed later in this argument, but only very briefly, because of the fact, as above indicated, that no exception was taken to this instruction at the time it was given. It is also worthy of mention that the trial Court did not limit this instruction to the appellants but directed it to any witness that may have testified. Accordingly the appellants, whose testimony was obviously designed to blacken the character and reputation of the Government officers, although without success, can not in any way consider themselves prejudiced by this instruction which they now so strenuously attack.

Equally without merit is the attack made by appellants against the other instructions which appellants, as above indicated, have assigned as error.

Attention is now called to pages 5 and 6 of appellants' opening brief where, by an incomplete quotation from the trial Court's charge to the jury, they attempt to show that their testimony was unfairly singled out for close scrutiny. It is the omitted language which gives the true picture (Tr. 331, lines 2-4, 8-10). Accordingly, the instruction under attack is now set out in full with the aforesaid omissions italicized:

> "Ladies and gentlemen of the jury, your task then is comparatively simple. I mean by that not that the case is a simple case or not a serious case or not an important case, because it is all of those things. I mean that the issue of fact as to the guilt or innocence of these particular defendants in this particular case is one that depends upon the weight which you attach to the testimony of the witnesses who testified in this case. On the one side the government presented the testimony of officers of the law engaged in the enforcement of particular statutes involved here; then on the other side, the testimony of the two defendants in this case. If you are convinced beyond a reasonable doubt of the correctness and truth of the testimony of the government's witnesses, your task is ended; you can find the defendants and each of them guilty, if that is the case. *If you are not convinced by the testimony of the government is truthful in this case, then you have a right to acquit the defendants.*
>
> So it is a matter of your determining the credibility of the witnesses for the government as against the defendants' testimony; resolving that issue of fact, you may apply the various stand-

ards that I have given. *Be sure to weigh the testimony of the witnesses, for that is precisely, simply stated, your task in this case.*" (Tr. 330, line 13-331, line 10.)

How anyone, after reading the aforesaid instruction in its entirety, can say that the Court was unfair to appellants, is beyond comprehension, particularly in view of the fact that the Court in its charge had also stated that the "function of the jury is to decide whatever question of fact is involved". (Tr. 316, lines 11-12.)

Appellants also contend that, in giving the following instruction, the trial Court was unfair to them and partial to the Government:

> "Both defendants have testified in their own behalf in this case. That being so, you will determine their credibility according to the same standards that apply to the other witnesses. I have given you some of those standards. In this connection you may consider the interest each of the defendants has in this case. Each of his hopes and fears and what each has to gain or lose as a result of your verdict." (Tr. 321, lines 10-16.)

A similar instruction was given approval by this Honorable Court, in *Mullaney v. United States,* 82 F. (2d) 638, 643.

As a matter of fact, having told the members of the jury that they were the ultimate judges of the facts of the case, the trial Court, had it so desired, could properly have commented on the glaring weaknesses of

portions of appellants' testimony, in accordance with the prevailing rule laid down in

Little v. United States (C.C.A. 8), 276 Fed. 915, 916, and cases cited therein.

See also,

Rucker v. Wheeler, 127 U.S. 85, 93.

That the trial Court did not do so is of little moment to the appellants, who have persisted, to paraphrase the words of the Supreme Court, in *Glasser v. United States,* supra, at page 83, in magnifying, on appeal, matters which were of little importance in their setting.

The appellants, continuing their fruitless endeavor to read error into the record where none may be found, also complain about the trial Court's instruction on aiding and abetting, even though such instruction is in the language of the statute, 18 U.S.C.A. 2(a), and, in almost identical language as that instruction approved by the Supreme Court, in

Nye and Nissen v. United States, 336 U.S. 613, 618, 619, affirming the decision of this Honorable Court reported in 168 F. (2d) 846.

Another example of appellants' tendency to ignore settled law is their attack on the trial Court's instruction on the alleged defense of entrapment. The trial Court instructed the jury as follows:

"* * * . There is no issue before the jury, no evidence to support any claim of so-called entrapment of the defendants on the part of the officers of the law. There are cases in which it is proper

for a jury to consider whether or not a person committed an offense only because he was entrapped into doing so by some officer of the law. Such an issue is not before the jury in this case. A plea of that nature, that is, of entrapment by an officer of the law only arises in a case where the defendant admits and does not deny the commission of the offense, and offers as an avoidance or excuse that he was enticed or entrapped into the commission of the offense by some officer of the law.

In this case the defendants have each denied the commission of the offense. Having denied the commission of the offense, there is no issue of any entrapment involved and the whole question for the jury to decide in this case is the guilt or innocence of the defendants, or each of the defendants, upon the basis of the evidence offered on behalf of the government and the evidence offered on behalf of the defendants as to the commission of the offense as charged in the three counts of the indictment." (Tr. 332-333.)

The appellants contend that the defense of entrapment is not necessarily reserved for those who knowingly admit the commission of crime. The authorities, however, are clearly to the contrary, as will be seen, for example, by reference to the case of

Silk and Meek v. United States (C.C.A. 8), 16 F. (2d) 568.

In this case, both appellants requested the Court to charge the jury on the law of entrapment and the Court refused. It appeared from the facts of the case that Meek admitted the commission of the crimes con-

tained in the several counts of the indictment of which he was convicted, but testified that he was induced and lured into the commission of these crimes. Silk, on the other hand, denied all of the charges against him. In reversing the conviction of Meek and in affirming the conviction of Silk, the Appellate Court said, at pages 570 and 571:

> "* * * . The evidence therefore presented a question of fact for the jury upon the issue of entrapment as to the defendant Meek, which should have been submitted under proper instructions. Cermak v. U. S. (C.C.A. 6) 4 F. (2d) 99.
>
> Silk denied all of the charges against him, and denied the testimony of the agents Bernard and Beazell with reference to him, except that he admitted being introduced to them by Meek. Both Meek and Silk denied the sale alleged in count 7. On this count, Meek was found not guilty, and Silk was found guilty. There was no entrapment of the defendant Silk."

The appellants complain that, since the Court found as a matter of law that no issue of entrapment was involved, it should not have instructed the jury on this subject. Bearing in mind that counsel for the appellants in his opening statement to the jury asserted that he would prove a case of entrapment (Tr. 198), this contention is so patently illogical that it calls for no reply by appellee herein. Here it should be stated that appellee will discuss the subject of entrapment in a later phase of this argument, with particular reference to the leading case of

Sorrells v. United States, 287 U.S. 435.

Another example of the fallacious reasoning indulged in by the appellants may be found in the exception which they also take to the trial Court's instructions with relation to the informer, even though this instruction is almost identical to an instruction on the same subject, cited with approval by the Supreme Court, in the case of

Vogel v. Gruaz, 110 U.S. 311, 316.

See also

In re Quarles and Butler, Petitioners, 158 U.S. 532.

Appellants, however, insist that the trial Court should have instructed the jury that an unfavorable inference must be drawn against the Government because of its failure to produce the informer. Since there was no issue of entrapment involved, any testimony which might have been elicited that the informer induced the sale of the narcotics, is immaterial. Furthermore, the Government did not have to call the informer to the witness stand to have him deny that he gave the package of narcotics to Lewis, as Lewis claimed, since it is the undisputed rule that no unfavorable inference is to be drawn against the party litigant for his failure to produce a witness who would merely corroborate what another witness has already testifed to under oath. It is obvious that the testimony of the informer would have been cumulative since, if the testimony of the Government agents was believed, the informer could not possibly have been with Lewis at the time Lewis asserted the informer gave him the narcotics in question.

In this connection see

Sher v. United States, 305 U.S. 251, 254.

It may be that appellee has failed to answer all of the "microscopic criticisms" that appellants have directed against the instructions of the trial Court to the satisfaction of the appellants. Be that as it may, in view of what has been shown herein, appellee respectfully submits that the trial Court committed no error, prejudicial or otherwise, in charging the jury.

II.

THE PROSECUTION ACTED PROPERLY IN INQUIRING, ON CROSS-EXAMINATION, INTO THE CRIMINAL RECORD AND BACKGROUND OF THE APPELLANT, DU VERNEY, AND THE TRIAL COURT ACTED PROPERLY IN ADMITTING THIS EVIDENCE AND IN ITS INSTRUCTIONS TO THE JURY IN THIS REGARD.

1. The criminal record—impeachment.

Questions relating to the admissibility of evidence in criminal cases in Federal Courts are not determined by the statutes and decisions of the several states in which the Federal Courts are sitting, but are based upon the common laws which existed in the United States prior to 1789, and the amendments thereto made by Congress or judicial decisions of the Supreme Court of the United States.

It has long been a settled rule in federal courts that a defendant who takes the stand in his own behalf may be cross-examined concerning a former conviction for the purpose of impeaching his credibility.

Such questions occasionally differ in form but it was early held that inquiry as to incarceration in a penal institution was equivalent to inquiry as to the conviction of a crime.

In *Lang v. United States,* (C.C.A.-7), 133 F. 201, the Court was called upon to determine certain questions relating to the admissibility of evidence in a certain criminal case, and in particular as to the proper scope of cross-examination of a defendant as to incarceration in a penal institution. The Court at page 204, said:

> "Questions relating to the admissibility of evidence in criminal prosecutions, based on violations of the Statutes of the United States, are questions wholly within the general rules and law applicable to the conduct of trials, and not at all subject, except as state statutes or decisions may be persuasive, to the statutes or decisions prevailing in the particular state where the court happens to sit; otherwise each state would have a substantial part in determining the manner in which the courts of the United States should enforce, not the law of the state, but the national laws.
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> Chief Justice Cooley, in Clemens v. Conrad, 19 Mich. 170, laid down the rule covering the cross-examinations of witnesses in relation to their conviction and incarceration for crime, as follows:
>
> > 'The right to inquire of a witness on cross-examination whether he has not been indicted and convicted of a criminal offense, we regard as settled in this state by the case of Wilbur v.

Flood, 16 Mich. 40 (93 Am. Dec. 203). It is true that in that case the question was, whether the witness had been confined in state prison; not whether he had been convicted; but confinement in a state prison pre-supposes a conviction by authority of law, and to justify the one inquiry and not the other would only be to uphold a technical and at the same time point out an easy mode of evading it without in the least obviating the reasons on which it rests. We think the reason for requiring record evidence of conviction has very little application to a case where the party convicted is himself upon the stand and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight, that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent. We prefer the early English rule on this subject. Priddle's Case, Leach, C. L. 382; King v. Edwards, 4 T.R. 440; and for the reasons which were stated in Wilbur v. Flood.'

The rule thus stated is reenforced by Thompson on Trials, Section 458; Greenleaf on Evidence (16th Ed.) 461; Notes to Taylor's Evidence, Vol. 3, p. 978 and the cases there cited, and many other cases at hand. We are content to adopt this rule."

The rule stated in the foregoing case is that which has been universally followed by the Federal Courts for many years.

In *United States v. Reid,* 12 Howard, 361; 13 L. Ed. 1023, the Supreme Court held that admissibility of evidence in criminal cases was not determined by statutes and decisions of state courts, but by the common law as it existed prior to 1789, the decisions of the Supreme Court and Acts of Congress, and since that decision no deviation has been made from such rule. Appellee does not believe that there can be any dispute relative to such rule of law and consequently will not discuss at length the several other cases cited in this brief on the proposition.

It has likewise long been a rule in the Federal Court that a defendant who takes the stand may be cross-examined concerning a former conviction for the purpose of impeaching his credibility. *Lang v. United States, supra; Merrill v. United States* (CCA-9), 6 F. (2d) 120; *Williams v. United States* (CCA-8), 3 F. (2d) 129; *Walker v. United States* (CCA-4), 104 F. (2d) 465; *Nutter v. United States* (CCA-4), 289 F. 484. The appellants admit this rule of law in their brief but argue that such prior conviction must be for a felony. In certain Federal Courts the rule has been that the impeaching questions may relate not only to convictions for felonies, but also for infamous crimes or crimes involving moral turpitude. In fact, several Federal Courts while differing somewhat in latitude in permitting such questions, nevertheless

hold that it is even permissible to ask a defendant on cross-examination concerning the commission of any crime, whatever the grade. This seems to be the rule in this circuit.

In *Merrill v. United States,* supra, this Honorable Court considered this question at great length, citing some twenty cases relating to the propriety of questions involving previous convictions, and finally held that such questions might be asked concerning any crime, including misdemeanors. In that case, the defendant had been asked concerning a misdemeanor for which he had been convicted some thirteen years previously and the Court there held that the admission of such question and answer was proper.

In *Glover v. United States* (CCA-8), 147 F. 426, the Court held that such a question might relate to any felony or "petit larceny".

In *Neal v. United States* (CCA-8), 1 F. (2d) 637, the Court after discussing this question at some length held that such a question might be asked concerning any crime "regardless of grade".

In *United States v. Liddy,* 2 F. (2d) 60; *Parks v. United States,* 297 F. 834; *Jones v. United States,* 296 F. 632, and *Krashowitz v. United States,* 282 F. 599, it was held that questions involving previous convictions for violations of the liquor laws, both state and federal, which had been construed as misdemeanors, might properly be admitted in evidence by cross-examination of the defendant.

In *Murray v. United States,* 288 F. 1008, the Court said, at page 1014:

> "Error is alleged because the government was permitted, under defendant's objection and exception, to inquire in cross-examination of defendant if he had not been convicted of some five misdemeanors, one in the year 1908, two in 1909, and two in 1911, all of which defendant admitted, but said he had not been in any trouble since 1911. Section 1067 of the District Code provides:
>
> > 'No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime * * * but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde. * * *'
>
> It is argued that this statute—
>
> > 'does no more, and was not meant to do more, than to remove the common law disability which attached to witnesses generally who had been convicted of felonies.'
>
> It is unnecessary to enter upon a review of the numerous cited authorities, which are not altogether in harmony, but sufficient to say that there is no ambiguity in the section, and the defendant, having become a witness in his own behalf, comes within its provisions. The fact of former convictions of crime were properly shown to affect his credit.
>
> The claim that the word 'crime' as used in the section, refers to felonies only, does not impress us, because, had Congress so intended, it were

> easy to so state, and also because the word 'crime' as commonly understood, includes both felonies and misdemeanors. Bouvier's Law Dictionary, vol. 1, p. 729; Standard Dictionary; 16 Corpus Juris, p. 51; Callan v. Wilson, 127 U.S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223;".

In *Callan v. Wilson,* 127 U.S. 540, 32 L. Ed. 223, the Supreme Court was required to construe the meaning of the word "crimes" as used in the Constitution of the United States. This case involved an appeal from a judgment refusing upon writ of habeas corpus to discharge the appellant from the custody of the appellee as Marshal of the District of Columbia. An Information had been filed by the United States in the police court of the district in which the defendant was charged with the crime of conspiracy. Trial was had by the Court without a jury and the defendant was found guilty, sentenced to pay a fine of $25.00, in default of which he was to suffer imprisonment in the jail for thirty days. The defendant-appellant contended that by virtue of the third article of the Constitution of the United States providing that "the trial of all crimes except in proceedings of impeachment, shall be by jury", the Fifth Amendment to the Constitution which provides that no person "shall be deprived of life, liberty or property without due process of law", and the Sixth Amendment to the Constitution which provides "that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district in which the crime shall have been committed",

he was tried contrary to the Constitution, inasmuch as he was denied the right to a trial by jury. The contention was that the meaning of the word "crime" included all criminal offenses even though they were merely misdemeanors, whereas the Government contended that a misdemeanor was not included within the meaning of the term "crime" or "criminal prosecution". The Court in a rather lengthy dissertation on this subject, in reversing the conviction, said, at page 549:

> "The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime', in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which re-

lates to trial by jury. There is no necessary conflict between them."

In *United States v. Waldon* (CCA-7), 114 F. (2d) 983, 984, 985, the Appellate Court said:

> "It is urged by appellant that his credibility could not be impeached by his confession or proof of other crimes unless those crimes were felonies, and that inasmuch as felonies are not punishable by imprisonment in a penal farm, and there was no other evidence to prove that he had been convicted of a felony, it was therefore error for the court to admit his service of the penal farm sentence. This seems to be the law in Illinois (see Bartholomew v. People, 104 Ill. 601, 44 Am. Rep. 97), and some other jurisdictions, including a few federal courts. Other jurisdictions have held otherwise. See Annotation, 6 A.L.R. 1643. This question does not appear to have been passed upon in this circuit. It seems to us fair to hold that the conviction inquired about must reasonably tend to prove a lack of character with respect to his credibility as a witness. If the former conviction shows such lack of character, we see no reason why it should not be admitted for what it is worth to counteract the presumption of credibility with which the law clothes him. That we are not bound by the decisions of the state courts in this respect cannot well be questioned. United States v. Reid, 12 How. 361, 53 U.S. 361, 13 L. Ed. 1023."

As a matter of fact, the appellants in their opening brief have cited two cases which support the position which appellee asserts.

In *Coulston v. United States,* 51 F. (2d) 178, 182, the United States Court of Appeals for the Tenth Circuit said:

> "* * *. In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible. Middleton v. United States (CCA-8) 49 F. (2d) 538; Glover v. United States (CCA-8) 147 F. 426, 8 Ann. Cas. 1184; Williams v. United States (CCA-5) 46 F. (2d) 731; Pittman v. United States (CCA-8) 42 F. (2d) 793; Lawrence v. United States (CCA-8) 18 F. (2d) 407; Haussener v. United States (CCA-8) 4 F. (2d) 884; Williams v. United States (CCA-8) 3 F. (2d) 129, 41 A.L.R. 328; Neal v. United States (CCA-8) 1 F. (2d) 637; Scaffidi v. United States (CCA-1) 37 F. (2d) 203. * * *."

In *Smith v. United States,* 10 F. (2d) 786, 788, this Honorable Court declared:

> "To impeach his testimony he might properly have been asked whether he had been *convicted of a crime,* and, if he denied that he had been convicted, it would have been permissible to produce the record in rebuttal." (Italics supplied.)

In view of the foregoing, the conclusion is inevitable that the prior narcotic violations of which Du Verney admittedly stood convicted in the State Court of California, infamous and degrading crimes, could properly be considered by the jury as impeaching his credibility, even though those violations for which Du Verney was sentenced to the county jail become, by vir-

tue of such sentences under California Law, misdemeanors rather than felonies.[1]

As a matter of fact, the prosecution, although it did not do so, could properly have brought out on cross-examination of the appellant, Lewis, the fact that he had been convicted of manslaughter (Tr. 23), an offense which likewise became a misdemeanor because of his sentence to the county jail rather than to the penitentiary.

Accordingly, the Court correctly instructed the jury, as heretofore indicated, that the presumption that a witness speaks the truth may be negatived, among other things, by evidence of his criminal record (Tr. 318-319).

2. The criminal background—entrapment.

In his opening statement to the jury counsel for the appellants began in this way:

> "The defendants, Lawrence Du Verney and Cecil Lewis, intend to show as their defense in this matter a case of entrapment." (Tr. 198.)

In the case of *Sorrells v. United States,* supra, at page 451, the Supreme Court of the United States said:

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[1] "A felony is a crime which is punishable with death or by imprisonment in the State prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the State prison, is also punishable by fine or imprisonment in a County jail, in the discretion of the Court, *it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the State prison,* * * *." (Italics supplied.) (Section 17, *California Penal Code.*)

> "* * * if the defendant seeks acquittal by reason of entrapment he can not complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."

Although the evidence ultimately disclosed that there was no issue of entrapment to submit to the jury, as the trial Court correctly found, the fact that counsel for appellants stated in his opening statement that he intended to show entrapment as a defense permitted the prosecution to inquire, as it did, into the criminal background of Du Verney to show his predisposition to commit the crimes for which he was being tried. That the evidence adduced on cross-examination from the lips of the appellant Du Verney showed a predisposition to commit the crimes for which he was on trial, can not be disputed; that there was no issue of entrapment to go to the jury can likewise not be disputed for reasons hereinabove and hereinafter set forth.

3. The cross-examination—its scope.

The appellants complain because the prosecution, on cross-examination, made a searching inquiry into Du Verney's background. That this inquiry was justified for the purpose of impeaching his credibility and negating the alleged defense of entrapment has already been shown. That this inquiry was also justified on the ground that Du Verney, by his testimony on direct examination, and his inconsistent and gratuitous statements on cross-examination, invited it, may also be seen by reference to the record. In *Raffel*

v. United States, 271 U.S. 494, 497, Mr. Justice Stone said of a defendant:

> "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."

See also

> *Brown v. Walker,* 161 U.S. 591, 597;
> *Fitzpatrick v. United States,* 178 U.S. 304, 315;
> *United States v. Gates* (C.C.A. 2), 176 F. (2d) 78, 80.

In the concurring opinion, in *Diggs, et al., v. United States* (C.C.A. 9), 220 Fed. 545, 563, 564, this language, in *State v. Wentworth,* 65 Me. 234, 243, 20 Am. Rep. 688, is cited with approval:

> "If he (defendant) discloses part, he must disclose the whole in relation to the subject-matter about which he has answered in part. * * * Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-incriminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."

See, also, *Wigmore on Evidence,* Volume 4, Section 2276, Subdivisions 2, d, also cited with approval in the concurring opinion in *Diggs v. United States,* supra, at page 563.

On direct examination, in response to this question of his counsel,

> "When you say 'stuff', Mr. Du Verney, what are you referring to?"

Du Verney replied,

> "Well, 'stuff' in the underworld means any kind of narcotics, when you say 'stuff'." (Tr. 269, lines 14-17).

The prosecution, on cross-examination, was, therefore, within its rights in asking Du Verney, who had volunteered his knowledge concerning narcotics, this question:

> "You don't know anything about narcotics, do you?" (Tr. 272, lines 22-23).

In his usual, characteristic way, Du Verney volunteered this unsolicited opinion:

> "I am not, not an expert." (Tr. 272, line 24).

Du Verney having first shown a familiarity with narcotics and thereafter proceeding to volunteer the gratuitous remark that he was not an expert in the matter of narcotics, the prosecution properly proceeded to show that he actually was such an expert, by proving his prior convictions under the State Narcotic Statute. Certainly these contradictions negated the presumption that he was speaking the truth.

See *Taylor v. United States* (C.C.A. 8), 19 F. (2d) 813, 817.

Similarly, Du Verney, under cross-examination on more than one occasion, volunteered the boastful information that everyone in the Fillmore District knew him (Tr. 284, 296), and thereafter, under further question, persisted in his repeated boasts in this regard (Tr. 297, 299). Du Verney, therefore, is in no position to complain because the prosecution asked him whether, included among those whom he claimed to know, were the Police and the Federal Bureau of Investigation (Tr. 299). Du Verney is likewise in no position to complain that, after he volunteered the information that he had a police record, the prosecution elicited the further fact that it was a long record (Tr. 299). What Du Verney did, in effect, by his boasting was to place his reputation in evidence. Having done so, the prosecution properly proceeded to impeach Du Verney's credibility by contradictory statements from his own lips. In a measure this is what occurred in the case of *Sue Hoo Chee v. United* States, supra, wherein the Court said, at pages 552 and 553:

> "The gambling house question is unmeritorious. A witness to appellant's good character was under cross-examination and he was asked as to his knowledge or belief that a part of the premises testified by appellant as used for a soda fountain was also used for gambling. The question was not allowed. Thereafter, while appellant was under cross-examination the United States Attorney put the question: 'Isn't it a fact, Mr. Chee, that you also operated that establishment as a gambling establishment?' Defense counsel ob-

> jected upon the ground that the United States Attorney was trying to prejudice the appellant before the jury. The objection being overruled appellant answered that for a time during the preceding year he had taken a percentage on card gambling.
>
> The cross-examination was legitimate; it corrected appellant's evidence as to the use the premises had been put and went to appellant's credibility."

During the trial, counsel for the appellants in his seeming eagerness to prove that the conversation between Du Verney and Agent Gross concerned girls and not narcotics, only succeeded in bringing out, on his cross-examination of Agent Gross through questions that the prosecution, of course, was not permitted to ask him, that not only was Du Verney a narcotic peddler, but that he was a vicious panderer as well (Tr. 115, 126).

Du Verney also, without success, attacked the integrity of the Government agents and law enforcement officials, when, on direct examination, he futilely attempted to smear the character of Agent Gross (Tr. 263-265), and when, on cross-examination, he unfairly inferred that he was the victim of a frame-up (Tr. 295).

From all of this, it is clearly apparent that the cross-examination of the appellant Du Verney did not exceed its proper scope, and that, accordingly, he can not in justice complain against the instruction of

the trial Court that the presumption that a witness tells the truth may be negatived, among other things, not only by evidence of his criminal record, but by evidence of his character and reputation as well (Tr. 319).

To summarize, the prosecution acted properly in inquiring, on cross-examination, into the criminal record and background of the appellant Du Verney, and the trial Court acted properly in admitting this evidence in its instructions to the jury in this regard.

III.

THE TRIAL COURT CORRECTLY HELD CERTAIN EVIDENCE TO BE ADMISSIBLE AND CERTAIN OTHER EVIDENCE TO BE INADMISSIBLE.

Without merit, then, as has already been seen, is the contention of the appellants that the trial Court erroneously admitted into evidence certain testimony concerning the criminal record and background of Du Verney. Equally without merit is the further contention of appellants that the trial Court erred in holding that certain statements made by Lewis prior to the termination of the criminal design, and outside the presence of Du Verney, was binding on Du Verney. The particular conversation to which appellants take exception is that in which Agent Gross testified that he met Lewis, that he told Lewis that he wanted to meet Du Verney, whom he considered as a "big connection" for his business, which Lewis obviously

believed was the narcotic business, and that Lewis agreed to arrange a dinner party at which he would arrange to have Du Verney present so that Gross might meet Du Verney (Tr. 69-72). The trial Court reserved its ruling on the admissibility of such conversation as against Du Verney until the prosecution made another motion in this regard. Subsequently, and after Agent Gross had testified that Lewis introduced him at the dinner party to Du Verney and that Du Verney made arrangements to sell him narcotics (Tr. 72-74), the trial Court, on the renewed motion of the prosecution, held that the aforesaid conversation between Lewis and Agent Gross could also be considered as against Du Verney (Tr. 74). This action of the trial Court was in accordance with the prevailing rules of law. It is fundamental that where the existence of a criminal conspiracy has been shown, every act, statement or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act, statement or declaration of all the conspirators and is evidence against each of them. It is also fundamental that when two or more persons are associated for the same illegal purpose, any act, statement or declaration of one of them in reference to the common design and forming a part of the *res gestae,* is binding against all of them even where the indictment does not charge a conspiracy.

These rules of law find their sanction in countless authorities, among which is the case of *Cossack v.*

United States, 82 F. (2d) 214, wherein this Honorable Court stated, at page 216:

> "When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others. It is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result. '* * * The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of those concerned in the furtherance of the original enterprise and with reference to common object is, in contemplation of law, the act or declaration of all. * * *' 16 C.J. § 1283, p. 646.
>
> The common object of persons associated for illegal purposes forms part of the res gestae, and acts done with reference to such object are admissible, though no conspiracy is charged. Vilson v. U. S., supra; Sprinkle v. U. S. (C.C.A.) 141 F. 811."

See, also, *Gooch v. United States* (C.C.A. 10), 82 F. (2d) 534, 537, and cases cited therein.

Finally, the contention of appellants—that the trial Court erred in holding that certain alleged conversations between Lawrence Mitchell Carter, a defense witness, and the informer, outside the presence of the Government agents, were inadmissible as being immaterial and hearsay—is so unfounded in law or in

logic as to call for no further comment by appellee herein.

Accordingly, the trial Court, as above indicated, correctly held certain evidence to be admissible and certain other evidence to be inadmissible.

IV.

THE EVIDENCE OVERWHELMINGLY SUPPORTS THE VERDICT OF THE JURY AND NEGATES THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW.

It is the accepted rule that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it. *Glasser v. United States,* 315 U.S. 60, 80.

In *Craig v. United States,* 81 F. (2d) 816, 827, certiorari denied, 298 U.S. 637, this Honorable Court said:

> "* * *. To sustain a conviction, we need not be convinced *beyond reasonable doubt* that the defendant is guilty: It is sufficient if there is in the record substantial evidence to sustain the verdict.
>
> In Felder v. United States (C.C.A. 2) 9 F. (2d) 872, 875, certiorari denied, 270 U.S. 648, 46 S. Ct. 348, 70 L. Ed. 779, the court said:
>
>> 'That we cannot investigate it (the testimony) to pass on the weight of the evidence is a point too often decided to need citation; nor can we, after investigation, use such doubts as may assail us to disturb the verdict of the jury. *That reasonable doubt which often pre-*

vents conviction must be the jury's doubt, and not that of any court, either original or appellate. (Cases cited.) Our duty is but to declare whether the jury had the right to pass on what evidence there was.' (Italics our own.)

The correct rule was thus tersely phrased in Humes v. United States, 170 U.S. 210, 212, 213, 18 S. Ct. 602, 603, 42 L. Ed. 1011:

'The alleged fact that the verdict was against the weight of evidence we are precluded from considering, if there was any evidence proper to go to thejury in support of the verdict (Cases cited.)'

See, also, 17 C.J. 264-269."

That there is substantial evidence to sustain the conviction of Du Verney on all counts of the indictment may be clearly seen by reference to the testimony of Agent Gross, corroborated in part by the testimony of Agent Mulgannon. That there is substantial evidence to sustain the conviction of Lewis on all counts of the indictment may be seen by similar reference to the testimony of these same agents, as well as by reference to the testimony of Agent McGuire. These agents, in addition to the Government chemist, Dr. R. F. Love, whose undisputed testimony that the package in question contained heroin (Tr. 61), were the only witnesses called by the prosecution. The defense consisted of the testimony of the appellants which squarely contradicted the Government agents, together with the immaterial testimony of Carter. The jury being the exclusive

judges of the credibility of witnesses had the right, as it did, to believe the Government witnesses and to reject the testimony of the appellants.

In *Dimmick v. United States* (C.C.A. 9), 135 Fed. 257, 262, a case cited with approval in *Craig v. United States,* supra, this Court said:

> "It is not within the province of this court to interfere with the verdict of the jury upon this ground. The rule is well settled that the credibility of witnesses and the probative force of facts introduced in evidence are the sole province of the jury;"

According to the testimony of the agents, which the jury believed, Du Verney made arrangements to sell the narcotics, set the price, drove the agents to the hotel, and directed them to the place where the narcotics were to be delivered. From these facts the jury concluded, as it did, that Du Verney sold and concealed, or aided and abetted in the sale and concealment, of the narcotics, in violation of the Harrison Narcotic Act and the Jones-Miller Act. According to the further testimony of the Government agents, which the jury also believed, Lewis arranged the introduction of Agent Gross and Du Verney, delivered the package of narcotics, which he had received from Du Verney, to Agent Gross, and was paid $225.00 by Agent Gross for the narcotics, $25.00 of which he kept for himself, and $200.00 of which he later gave to Du Verney. The jury, of course, did not accept the fantastic story told by Lewis that the informer had given him the narcotics to deliver to Agent Gross, preferring

rather to believe the agents who testified that the informer was with them at that time. This unsatisfactory explanation of the possession of narcotics did not satisfy the jury, which properly found Lewis guilty of a violation of the Jones-Miller Act. Furthermore it is obvious that Lewis apparently acted as Du Verney's agent in the sale, making him equally liable as a principal, 18 U.S.C.A. 2, supra, and *Nye and Nissen v. United States,* supra, but whether as agent, or otherwise, he delivered the narcotics to Agent Gross, which delivery, apart from the sale itself, constituted a violation of the Harrison Narcotic Act. *Miller v. United States* (C.C.A. 7), 53 F. (2d) 316, 317. Accordingly, having found the appellants guilty of violating the Harrison Narcotic Act and the Jones-Miller Act, the jury, on the basis of the evidence which sustained these convictions, could properly conclude, as it did, that the appellants conspired to violate these Acts. The conversations of the appellants with the Government agents, the actions of the appellants, and the proven overt acts clearly established a conspiracy and the appellants' guilt thereof. That a party may be found guilty of a substantive offense because he aided and abetted in its commission and likewise be found guilty of conspiracy by committing the acts which also constitute aiding and abetting, is now an established rule of law requiring no further amplification or argument by appellee herein. *Nye and Nissen v. United States,* supra.

In arguing that the evidence is insufficient to sustain their conviction, appellants also contend that they

should have been acquitted because they were entrapped into the commission of the crimes. How the appellants can, on the one hand, deny that they engaged in the sale and concealment of narcotics, knowingly or otherwise, and, on the other hand, assert the defense of entrapment, is something as puzzling to the appellee now as it was when this illogical and unsupported theory was advanced during the course of the trial. As above indicated, in this language of the trial Court in its instruction to the jury, "A plea of that nature, that is of entrapment by an officer of the law only arises in a case where the defendant admits and does not deny the commission of the offense, and offers as an avoidance or excuse that he was enticed or entrapped into the commission of the offense by some officer of the law" (Tr. 332).

In concluding this phase of the argument, and in further support thereof, appellee now quotes from the testimony of Agent Gross, on direct examination, mention of which has heretofore been made and which, as above indicated, has been in substance corroborated by the testimony of other agents:

> "Q. When you were introduced to Mr. Lewis, what name did you give him?
>
> A. Paul.
>
> Q. What was said by you and Mr. Lewis?
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> A. I said 'Hello'. He said 'Hello'. I stated, Cecil, I just got in from Chicago. Things got a little warm for me there so I came out here. I want to go into business and I need a connection.'
>
> Q. And did you tell him what kind of business?
>
> A. No, that—I believe that was understood.

Q. Go ahead. What else did you say?

A. I said, 'I heard that a man called Red DuVerney is a big connection here and I would like to meet him. Do you know him?'

Lewis said, 'Yes, I know him, but he doesn't come in very often. He comes in only when we have parties or dinners.'

I replied, 'I will sponsor a dinner; I will throw a dinner for tomorrow night. Will you invite DuVerney?'

Lewis said, 'I will call him tonight and have him here about nine o'clock tomorrow night.' " (Tr. 70).

* * * * * * *

"Q. Then what happened?

A. Shortly after 9:00 p.m. DuVerney entered the bar—the bar-room, sat down at the table and was introduced to the informer, Agent Milgannon and myself, by Cecil Lewis.

Q. And then what happened?

A. About ten minutes later after he—after I finished dinner, I called DuVerney over to the bar.

Q. Is the bar and the dining room in the same place?

A. It is right beside the table; they are all in the same room.

Q. I beg pardon?

A. They are all in the same room, the bar and the table we were sitting at. I called him over to the bar and I said, 'Red, I just got in from Chicago'——

Q. May I interrupt you for a minute? How was he introduced to you by Lewis? As Red DuVerney?

A. Red DuVerney.

Q. Go ahead.

A. I said, 'Red, I just got in from Chicago. I was putting down a little stuff in Chicago'—meaning I was selling narcotics—'and things got a little warm for me there, so I came out here to the coast. I am trying to find a connection, and I hear you are active. Can you do me any good?'

Q. What was said? Go on; just relate the conversation.

A. Red stated, 'I don't sell $10 papers. If you want an ounce, I can take care of you.'

Q. Anything said about the price of the ounce?

A. I said, 'What would an ounce go for?'

He said, '$600.' I said, 'I would like to buy a sample first before putting out that amount of money.'

DuVerney stated, 'I will sell you half an ounce as a sample for $300.'

I then replied, 'The price sounds all right. When and where will I get the stuff?'

DuVerney stated, 'Give me your phone number. Go on home and I will call you about 10:30.'

I gave DuVerney my phone number as Graystone 4-6192." (Tr. 72-73).

*　　*　　*　　*　　*　　*　　*

"Q. Did you get a phone call or did you make a phone call to either Lewis or DuVerney later that evening?

A. I received a phone call from DuVerney.

Q. And what was the phone call? What was said?

A. DuVerney called at about 10:30 and said, 'I am having a hard time getting the stuff; I'm a little busy; I will call you back later.' He said, 'I had a hard time getting your number. I had to call Cecil again to get the right one.'

I said, 'I gave Cecil my wrong number; I didn't have the phone very long, I'm sorry.'

Q. You hung up the phone then?

A. That is correct.

Q. Did you speak by phone either to Lewis or DuVerney that same evening or early the next morning?

A. I did.

Q. What was said and who called you?

A. DuVerney called at about 1:30 a.m.

Q. The morning of August 3?

A. That is correct.

Q. The dinner took place the evening before, August 2?

A. On the evening of the 2nd.

Q. What time was it the morning of August 3 that he called?

A. 1:30 a.m.

Q. What time?

A. 1:30 a.m.

Q. And what was said?

A. DuVerney said, 'Paul, I am ready to do business. Have the money ready, have the three hundred ready, and I will pick you up at your house in half an hour.'

Q. Did you give him the address?

A. I did. I said, 'That will be at 2 o'clock?' He said, 'That is right'. I said, 'My address is 920 Van Ness.' I said, 'I'll be there and I will have the money ready.'

Q. Did you tell him you would be out in front?

A. I said, I will meet you in front of my house.

Q. Then you hung up the phone?

A. That is correct.

Q. Did you see DuVerney early that morning after that phone call?

A. I did.

Q. Was anyone with you when you saw him?

A. Agent Milgannon was with me.

Q. And where were you when you saw DuVerney?

A. Agent Milgannon and I were standing in front of my house.

Q. At 920 Van Ness Avenue?

A. That is correct.

Q. Is that an apartment house?

A. It is.

Q. Did DuVerney walk up to you or did he drive up to you?

A. He drove up to me.

Q. What kind of a car was he in?

A. 1949 Cadillac." (Tr. 76-78).

* * * * * * *

"Q. What was that conversation?

A. I said, 'Red, I hope this is good stuff you are getting me as I don't want to pay out that amount of money for bad stuff.' He said, 'Don't worry; the stuff is powerful; it is 90 per cent pure. You can cut it as many times as you wish.'

Q. Go ahead. Did you discuss price again?

A. I said, 'How much will it be?' He said, 'I told you it will be $300.'

Q. For how much?

A. For a half ounce.

Q. Go ahead.

A. I said, 'Red, I only have $200.' He said, 'When I make a deal for three hundred, it is $300. When I make that deal, that goes.' He said, 'Now I will call my dago friend in North Beach. I will have to make a phone call.'

Q. That is what DuVerney said?

A. That is what DuVerney said.

Q. Go ahead.

A. We then drove to the Edison Hotel.

Q. By 'we' you mean DuVerney drove the car?

A. DuVerney drove the car and Agent Milgannon and I sat in the rear seat.

Q. Any other stop then other than that one in front of the beauty shop?

A. No.

Q. Did DuVerney get out of the car?

A. DuVerney got out of the car and instructed Agent Milgannon and I to remain in the car.

Q. How long was DuVerney away from you?

A. Approximately 45 minutes.

Q. Where did DuVerney go when he left?

A. The Edison Hotel.

Q. How long did he remain in the hotel, if you remember?

A. 45 minutes.

Q. Then what happened?

A. He came out of the Edison Hotel, walked to the car, entered the car, at which time he stated, 'You guys go on in to the lobby now and you will be taken care of.' I stated, 'I thought I was doing business with you. I don't like to do business with others.' DuVerney said, 'Never mind. Go on in to the hotel. My boy will take care of you.'

Q. Was the price discussed which you were to give to the man in the hotel?

A. It was.

Q. How much were you supposed to give?

A. 225.

Q. Was the word 'stuff' mentioned?

A. The word 'stuff' was mentioned, yes.

Q. By 'stuff' you meant what, in the parlance of narcotic peddlers?

A. It means narcotics.

Q. Does that mean heroin?

A. It can. Yes, it means heroin.

Q. Then you went into the hotel?

A. Well, I asked DuVerney when I could see him again.

Q. What did DuVerney say?

A. He said, 'You will have to get in touch with Cecil. Cecil will call me.'

Q. You got out of the car?

A. Agent Milgannon and I both got out of the car and walked into the lobby of the hotel.

Q. Now I notice you said $225. Did you question why the amount was $225 rather than $200?

A. No, I didn't. He quoted the price, and that was it.

Q. Do you know how many grains are in an ounce?

A. 437—437 and ½.

Q. All right. Go ahead. Did DuVerney drive away?

A. I don't know where DuVerney went.

Q. You and Milgannon entered the hotel?

A. That is correct.

Q. That is the Edison Hotel?

A. That is right.

Q. Then tell us what happened and who you saw.

A. We walked in the front door, and we were immediately approached by the defendant Lewis.

Q. Go ahead.

A. Lewis instructed Agent Milgannon to wait over to one side. He then had a conversation with me.

Q. All right. What was the conversation that Lewis had with you?

A. Lewis said, 'Paul, Red was in here a little while ago, and he gave me the stuff. He told me to give it to you and get $225.' He said, 'Red, he was a little afraid to do business with you and your friend because he doesn't you.'

Q. Go ahead.

A. He said, 'Have you got some money?' I said, 'I have the money.' 'Well,' he said, 'The stuff is up in my room. We will go up and get it.'

Q. Go ahead.

A. The defendant Lewis and I then entered the elevator at the Edison Hotel, proceeded to the sixth floor and entered Room 602.

Q. Did Milganon go with you?

A. No, he didn't; he remained in the lobby.

Q. Go ahead.

A. We went in Room 602. Cecil said, 'You are sure you have the money?' I said, 'I have.' I showed him the money. Lewis then handed me the package, a small white package in exchange for the $225 of government-advanced funds.'

Q. Did you give $225 to Lewis?

A. I did.

Q. He gave you the package?

A. That is correct.

Q. Was the package in an envelope?

A. It was wrapped in a piece of white paper folded in envelope fashion.

Q. Inside the white paper folded in envelope fashion was a white powder?

A. That is correct.

Q. Is this the envelope to which you refer that the powder was in (showing)?

A. It is. It bears my initials and the date.

Q. Now you received that from Lewis and it contained the powdery substance?

A. That is correct." (Tr. 80-84).

* * * * * * *

Rebuttal.

"Mr. Karesh. Q. Mr. Gross, when you left the Edison Hotel after the party on August 2nd, about what time did you say it was?

A. Approximately 10:15.

Q. And did this man that was referred to as Les leave with you?

A. He did.

Q. From the time you left the party until the time you met DuVerney in front of the hotel at two o'clock in the morning, was Les with you at all times?

A. He wasn't with me from the time I left my house with DuVerney until we got to the front of the Edison Hotel.

Q. No, what I mean, from the time you left the party until the time you met DuVerney at two o'clock in the morning; during that period of time was Les with you at all times?

A. He was.

Q. Was Agent Milgannon with you too?

A. He was." (Tr. 304-305).

To summarize, the jury believed the testimony of the officers that Du Verney, who made a hurried departure for Honolulu after a warrant for his arrest issued, arranged the narcotic transaction ultimately consummated by Lewis, and did not believe the contradictory denials of Du Verney and the fantastic story of Lewis that the informer gave him the narcotics for delivery to the Government Agent. Had the jury believed Du Verney and Lewis, they had no choice, as the trial

Court instructed, except to acquit, not on the ground that there was entrapment, which is a legal defense for the commission of crime, but that no crime whatsoever was committed. From all of this, the conclusion is likewise inevitable that the evidence overwhelmingly supports the verdict of the jury and negates the defense of entrapment as a matter of law.

V.

THERE IS NO REVERSIBLE ERROR IN THE RECORD, ASSUMING, ARGUENDO, THAT THERE IS ANY ERROR AT ALL.

Rule 52(a) of the Federal Rules of Criminal Procedure reads as follows:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Prior to the year 1919, the Federal Courts had held that any error was ground for reversal, unless the opposite party could affirmatively show that such error did not affect a substantial right of the complaining party. In 1919, Section 269 of the Judicial Code, 28 U.S.C.A. Sec. 391, was amended to read as follows:

> "On the hearing of any appeal, certiorari, writ of error or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Rule 52(a) of the Federal Rules of Criminal Procedure is, of course, a restatement of Title 28 U.S.C.A., Section 391, as amended.

One of the first interpretations of this amended Section 391 of Title 28 U.S.C.A. occurred in the case of *Haywood v. United States* (C.C.A. 7), 268 F. 795. In that case the Appellate Court, in passing upon the question of what constituted reversible error, stated, at page 798:

> "Before proceeding further, we think it right to emphasize the fact that a review by an appellate tribunal is not a requirement in affording a defendant the due process of law that is secured to him by the Constitution. In England writs of error in criminal cases are of comparatively recent origin. In our country, though writs of error within certain limitations have been allowed from the beginning, the grant has been of grace or expediency, not of constitutional demand.
>
> In the court of first instance the defendant is given his day in court, his trial by jury, his opportunity to confront opposing witnesses, and all other elements of due process of law. And if Congress might have withheld entirely the privilege of review, it is self-evident that Congress may at any time reduce the previously granted privilege. From recent legislation (40 Stat. pt. 1, p. 1181, Comp. St. Ann. Supp. 1919, Sec. 1246) we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that

> the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

A leading pronouncement of the Supreme Court upon this question is that found in the case of *Berger v. United States,* 295 U.S. 78. That case involved a conspiracy to utter false notes of a Federal Reserve Bank. The proof disclosed two conspiracies instead of one, in one of which conspiracies, the defendant Berger was not involved. The Court in passing upon the question of whether the variance amounted to such an error as constituted a prejudice to the substantial rights of the defendant, stated, after citing Section 269 of the Judicial Code hereinabove set forth:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not to be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. Bennett v. U. S., 227 U.S. 333, 338; Harrison v. U. S., 200 Fed. 662, 673; United States v. Willis, 36 F. (2d) 855, 856-857. Cf. Hanger v. United States, 285 U.S. 427, 431-433.

Evidently Congress intended by the amendment to Sec. 269 to put an end to the too rigid application sometimes made of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See Haywood v. U. S., 268 Fed. 795, 798; Rich v. United States, 271 Fed. 566, 569-570."

See also

Kotteakos v. United States, 328 U.S. 750.

In our case at bar, therefore, it becomes necessary for the appellants to show that not only was error committed but that upon the record as a whole, such error is shown to affect the substantial rights of the appellants, and that the trial Court erred in overruling the motion of each appellant for a new trial. The appellants in their opening brief have not shown such to be the fact, nor does the record in this case support such a contention. In the first place, the errors, if any there be, are purely technical. In the second place, the appellants were obviously guilty of the crimes charged, as the overwhelming evidence against them showed, and the alleged errors obviously had not the slightest effect upon the jury in enabling its members to arrive at their verdicts.

The Appellate Courts give judgment after an examination of the entire record without regard to technical errors, defects or exceptions which would not affect the substantial rights of the parties, and when

and if any error is harmless, the judgment of the trial Court will not be disturbed. In this case, the evidence is so clearly convincing and conclusive that the appellants are guilty, that the jury could not reasonably have reached any other verdict, and, consequently, the appellants have not been deprived of any substantial rights and have no grounds for reversal.

CONCLUSION.

In *Graham v. United States,* 231 U.S. 474, 480, the Supreme Court said:

> "In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth."

In denying appellants bail on appeal, the trial Court observed that these men were dangerous criminals who should not be at large (Tr. 33). Appellee, of course, does not ask this Honorable Court to affirm the judgments of conviction herein merely because the appellants are dangerous men. What appellee does respectfully urge is that where, as in our case at bar, vicious men have been convicted by clear and convincing evidence, after an eminently fair and impartial trial, they should not be released, perchance upon a technical error, to immediately once more menace society.

Accordingly, it is submitted that the appellants' convictions on all counts of the indictment should be affirmed.

Dated, San Francisco, California,
March 17, 1950.

Respectfully submitted,

Frank J. Hennessy,
United States Attorney,
Joseph Karesh,
Assistant United States Attorney,
Attorneys for Appellee.

No. 12398

United States
Court of Appeals
For the Ninth Circuit.

COVEY GAS AND OIL COMPANY,
a corporation,

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Eastern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12398

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Plaintiffs:

BEN W. DAVIS, ESQ.,
Pocatello, Idaho.

LOUIS F. RACINE, ESQ.,
Pocatello, Idaho.

For Defendant:

O. R. BAUM, ESQ.,
Pocatello, Idaho.

BEN PETERSON, ESQ.,
Pocatello, Idaho.

In the District Court of the United States in and for the District of Idaho, Eastern Division

1524

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY of Idaho, a corporation,

Defendant.

COMPLAINT

Plaintiffs complain of the defendant and allege as follows:

I.

That the plaintiffs and each of them are residents of the State of Utah and the defendant is a corporation of the State of Idaho. That the matter in controversy exceeds, exclusive of all interest and costs, insofar as each of the plaintiffs herein, are concerned, the sum of $3,000.00.

II.

That Norell T. Checketts and Twilla Checketts, at all times herein mentioned have been and now are husband and wife and were the father and mother respectively of a child, Gary Checketts, now deceased.

III.

That the defendant, Covey Gas and Oil Company

of Idaho, a corporation, during all times herein mentioned, was and now is, a corporation organized and existing under and by virtue of the laws of Idaho.

IV.

That at all times herein mentioned, the defendant was the owner of an oil tanker used by it in and about the operation of its business; said tanker at the time herein mentioned, bearing Idaho License No. 1B-806.

V.

That at all times herein mentioned, Ralph L. Bowman was an employee of the defendant, acting upon the business of said employer and within the scope of his employment.

That on the 24th day of February, 1947, the defendant, by and through its agent and employee, so negligently and carelessly operated said oil tanker upon what is known as U. S. Highway 30-91 in Bannock County, Idaho at a point approximately four miles in a southerly direction from the City of Pocatello, Idaho, that it drove and caused to be driven said oil tanker against the body of the said Gary Checketts who was crossing said highway from a school bus.

VI.

That as a result, the said Gary Checketts was mangled, bruised and killed; that the actions of the defendant in the operation of said oil tanker was wanton, wilful, reckless and in complete disregard of the rights of Gary Checketts and these plaintiffs.

VII.

That the said Gary Checketts was a bright, healthy, strong, industrious and intelligent boy; that he was very affectionate and devoted to his parents and his society and his companionship afforded and had he lived, would have continued to afford to his parents, great and valuable comfort and companionship and out of the affection and duty which he bore to them, he would, had he lived, contributed in the aggregate, large sums of money to the support of his said parents, the plaintiffs herein, and he would, had he lived, performed services and earnings of great value to his parents prior to his majority. That the plaintiffs herein are and were at all times herein mentioned, people of meager means, whose state and condition in life is such that during their declining years, they would have required and invoked and received from their said son, substantial contributions to their maintenance and support, extending over a long period of years and during said time would have received great comfort and companionship in the society of their said son. That the plaintiffs herein have incurred in medical and hospital expense, the sum of $407.50; that they have been damaged in the sum of $75,000.00 general damages and have been damaged in and are entitled to punitive damages in the sum of $25,000.00.

Wherefore, Plaintiffs demand judgment against

the defendant in the sum of $100,407.50 and for all costs, and plaintiffs pray for general relief.

/s/ B. W. DAVIS,

/s/ L. F. RACINE, JR.,

Attorneys for Plaintiffs.

Plaintiffs herein request and demand a trial by jury.

[Endorsed]: Filed January 26, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and as and for its answer to the complaint of the plaintiff herein alleges, denies and affirms as follows:

First Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

I.

Defendant denies each and every allegation in said complaint contained, save and except those particular allegations hereinafter specifically admitted.

II.

Admits the allegations of paragraphs I, II and III.

III.

Defendant admits that it was the owner of an automobile truck bearing license No. 1B-806, but denies that the said truck was what is commonly called an "oil tanker."

IV.

Answering paragraph V defendant admits that Ralph L. Bowman was an employee of the defendant on the 24th day of February, 1947, but denies each and every other allegation in said paragraph V.

Third Defense

(Affirmative Defense)

Further answering said complaint, and as a third defense thereto, your said defendant alleges:

I.

That at the time and place mentioned in said complaint the said Gary Checketts did not exercise due care, caution or prudence in the premises to avoid said accident and the resulting injuries, and that the injuries and the death of the said Gary Checketts was directly and proximately contributed to, and caused by, the fault, carelessness and negligence of the said Gary Checketts.

Fourth Defense

(Affirmative Defense)

Further answering said complaint, and as a fourth defense thereto, your said defendant alleges:

I.

That at the time and place mentioned in said complaint the person in charge of the said school bus owned and operated by Independent School District No. 1, Class A, Bannock County, State of Idaho, namely Robert R. Smith, did not exercise ordinary care, caution and prudence in the premises to avoid the accident, and more particularly the accident herein in question and the resulting injuries that arose out of the said accident, and that the death of the said Gary Checketts was directly and proximately contributed to and caused by the fault, carelessness and negligence of the said person operating said bus owned by the said Independent School District No. 1, Class A, Bannock County, Idaho, and that at the time and place mentioned in said complaint the person operating the said school bus owned by Independent School District No. 1, Class A, Bannock County, Idaho, namely Robert R. Smith, was acting in the line, course and scope of his employment as the driver of said school bus for and on behalf of the said Independent School District No. 1, Class A, Bannock County, Idaho.

Fifth Defense

(Affirmative Defense)

Further answering said complaint, and as a fifth defense thereto, your said defendant alleges:

I.

That at all times mentioned in said complaint Ralph L. Bowman was operating said truck in a

careful and prudent manner and at all times mentioned in said complaint the said Ralph L. Bowman kept and maintained a look out upon said highway, and at all times took every reasonable precaution to avoid the collision referred to in said complaint and at all times mentioned in said complaint had reasonable control over the motor vehicle driven by him.

Defendant further alleges that at no time did Ralph L. Bowman pass the school bus referred to in said complaint negligently or otherwise.

Sixth Defense

Further answering said complaint, and as a sixth defense thereto, your said defendant alleges:

I.

That heretofore the said plaintiffs herein instituted an action in the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, entitled Checketts vs. Covey Gas and Oil Company, a corporation, and Ralph L. Bowman, and thereafter the said plaintiffs herein procured an order of dismissal in said matter as to the defendant in this action, leaving said action pending against the said Ralph L. Bowman, he being the identical person referred to in the pleading in this case as the agent of the defendant herein; that a copy of said Order of Dismissal is hereto attached, marked "Exhibit A" and made a part of this Answer as if copied herein at length, and that said action in the

Fifth Judicial District of the State of Idaho, in and for the County of Bannock, is now pending.

Wherefore, Your defendant, having fully answered, prays that the plaintiffs take nothing by reason of their said complaint and, the defendant herein, having tendered a third party complaint herein, prays for the relief as asked for in said third party complaint, and for all proper relief.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant.

"EXHIBIT A"

In the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY of Idaho, a corporation and RALPH L. BOWMAN,

Defendants.

ORDER OF DISMISSAL

Upon Motion of Attorneys for Plaintiffs, it appearing to the Court that a counter claim has not been made or affirmative relief sought by a cross-complaint or answer of the defendants or either

Exhibit A—(Continued)

of them, and that plaintiffs have a legal right to dismiss their case or cause of action as to Covey Gas and Oil Company of Idaho, a corporation, one of the defendants and to retain their right to prosecute and continue with their action against Ralph L. Bowman, defendant and the Court being fully advised in the premises;

It Is Ordered that the Amended Complaint of the plaintiffs herein and the plaintiffs' case or cause of action as to Covey Gas and Oil Company of Idaho, a corporation, defendant, is, upon plaintiffs' Motion hereby dismissed at plaintiffs' costs and without prejudice to plaintiffs in the bringing of another action, and

It Is Ordered that said dismissal is not a dismissal of plaintiffs' case or cause of action against Ralph L. Bowman, defendant.

Dated this 26th day of January, 1949.

L. E. GLENNON,
District Judge.

Filed Jan. 26, 1949, 3:25 p.m.

ANNA KEEFE,
Clerk, Auditor and Recorder, Bannock County, Idaho.

[Endorsed]: Filed April 4, 1949, U.S.D.C.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the plaintiffs by and through their attorneys, B. W. Davis and L. F. Racine, Jr., and move to strike certain portions of defendant's defense upon the following grounds and for the following reasons, to-wit:

I.

Plaintiffs move to strike the fourth affirmative defense of the defendant as found on pages 2 and 3 of defendant's answer for the reason that the same contains only redundant and immaterial matter and that said defense is confusing and that any evidence that would be competent on behalf of the defendant in support of such defense would be competent under the general allegations of the defendant's first, second, third and fifth defenses.

II.

Plaintiffs move to strike what is termed the Sixth defense of the defendant as found on Pages 3 and 4 of defendant's answer, for the reason that said Sixth defense is redundant, immaterial and does not in any way plead or set up any defense to the plaintiffs' action, plaintiffs having a right to proceed against the defendant in this cause irrespective of any action that may be pending against Ralph L. Bowman. That said defense can only tend to confuse the issues and evidence in support of the

same could not be introduced in the trial of this cause.

Respectfully submitted:

/s/ B. W. DAVIS,

/s/ L. F. RACINE, JR.,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT OF MAY 20, 1949 RULING ON PLAINTIFFS' MOTION TO STRIKE

This cause came on regularly in open court on plaintiffs' Motion to Strike, B. W. Davis representing plaintiffs and O. R. Baum and Ben Peterson representing the defendant.

After hearing respective counsel, the Motion as it pertains to the fourth affirmative defense was overruled without prejudice, and granted as it pertains to the sixth defense.

[Title of District Court and Cause.]

MOTION

Comes now the defendant above named and moves the Court for an order bringing in to the above entitled case Ralph L. Bowman, operator driver of

the truck referred to in plaintiffs' complaint, upon the ground and for the reason that complete relief cannot be accorded between the person already parties to said cause unless said Ralph L. Bowman is made a party hereto.

This motion is based upon the records and files of the above entitled action and is predicated upon the provisions of Rule 19, Subsection B of the Federal Rules of Civil Procedure.

Dated this 1st day of June, 1949.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JUNE 1, 1949 RULING ON DEFENDANT'S MOTION TO BRING IN ADDITIONAL PARTY DEFENDANTS

This cause came on regularly in open court for hearing on defendant's Motion to Bring in Additional Party Defendants. After hearing respective counsel, the Court announced that the Motion was denied.

Whereupon the case came on for trial before the Court and a jury, B. W. Davis and L. F. Racine appearing as counsel for plaintiffs and O. R. Baum and Ben Peterson appearing as counsel for defendant.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. H. B. Markham, W. Grant Kimball and James L. Craig, whose names were so drawn, were excused for cause; Jerry E. Johnson and Bernice Berry, whose names were also drawn, were excused on plaintiffs' peremptory challenge; and Mrs. W. H. Coke, whose name was likewise drawn, was excused on defendant's peremptory challenge.

The Court admonished the jury and recessed until 10 o'clock A.M., Thursday, June 2, 1949.

The following jurors were in the box at time of recess:

Ray J. Eskelson	Mrs. Val Goodman
Mrs. Theodora Poole	Mrs. Clara Jones
Wilfred Glead	Theodore Meierotto
Mrs. Edna Robins	E. A. Crockett
Bryan J. Larsen	Ethel T. Parker
Ed. Morgan	Murl McNabb

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JUNE 2, 1949

The trial of this cause was resumed before the Court and jury, counsel for respective parties being present.

Following are the names of the persons whose

names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to-wit:

Ray J. Eskelson	Mrs. Val Goodman
Mrs. Theodora Poole	Mrs. Clara Jones
Wilfred Glead	Theodore Meierotto
Mrs. Edna Robins	E. A. Crockett
Bryan J. Larsen	Ethel T. Parker
Ed Morgan	Murl McNabb

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of Vernon Balls and Donald R. Foote were drawn from the jury box, and on being sworn and examined on voir dire, were found duly qualified, and were accepted by counsel for the respective parties.

The jury panel and the alternate jurors were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of cause by counsel, Ralph L. Bowman, Davis Carter, Walter Eims, Mr. Bishoff, Margrett Bishoff, Reed Howe, Mrs. LaVerne Hardman, R. J. Reynolds, Alma Marley, R. M. Pugmire, Norell T. Checketts and Twila Checketts were sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff.

It was stipulated in open court by respective counsel that Garey Checketts died as a result of the accident in question.

On motion of counsel for plaintiffs, the Com-

plaint was ordered amended by striking "$950.00" in the third line of page three of the Complaint and inserting "$407.50" in lieu thereof, and by striking "$100,950.00" in the prayer of the Complaint and inserting "$100,407.50."

Here plaintiffs rest.

Robert R. Smith, Fred W. Goodsen and Talph L. Bowman were sworn and examined as witnesses on the part of the defendant, and here defendant rests, and both sides close.

After admonishing the jury, the Court excused them to 10 o'clock a.m. on Friday, June 3, 1949.

In the District Court of the United States, for the District of Idaho, Eastern Division

No. 1524

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY, a corporation,

Defendant.

VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess damages against the defendant in the sum of $35407.50.

/s/ BRYANT J. LARSEN,
Foreman.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JUNE 3, 1949

The trial of this cause was resumed before the Court and Jury, counsel for the respective parties being present, it was agreed that the jury panel and alternate jurors were all present.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury. The Court discharged the alternate jurors, and the jury panel retired in charge of bailiffs, duly sworn, to consider of their verdict.

Upon stipulation of counsel that each party would pay one-half the cost of lunch, the Court ordered the Marshal to them with lunch.

On the same day the jury returned into court, counsel for respective parties being present, whereupon the jury presented their written verdict, which was in the words following:

[Title of District Court and Cause.]

"We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess damages against the defendant in the sum of $35,407.50.

Bryant J. Larsen, Foreman."

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

In the District Court of the United States, for the District of Idaho, Eastern Division

No. 1524

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY, a corporation,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on June 1, 1949, et seq., both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiffs in the sum of $35,407.50.

It is hereby ordered, adjudged and decreed that plaintiffs recover of defendant the sum of $35,407.50, with interest, and their costs of action.

Dated at Pocatello, Idaho, this 3rd day of June, 1949.

/s/ ED. M. BRYAN,
Clerk.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant above named and moves the Court for an order granting it a new trial for the following reasons, and on the following grounds:

I.

That the Court erred in his instructions to the jury in the following particulars, to-wit:

(a) That the defendant requested that the Court instruct the jury in the above cause that in arriving at the damages to which the plaintiffs were entitled they had no right to take into consideration the mental suffering and the mental grief of the plaintiffs by reason of the death of Gary Checketts, and that the Court refused to give said instruction as requested by defendant, or any other instruction on the subject; that such request for instruction was in writing and filed with the Court prior to the Court's instructing the jury.

(b) That the Court instructed the jury, among other things, that in the event they found for the plaintiffs they could, in arriving at the amount of damages, consider loss of companionship, loss of society and comfort, but that said instruction was not limited as to what items of damages they could not take into consideration, and by said instruction implied that they could take into consideration in arriving at their verdict mental suffering and mental grief.

II.

That the Court erred in giving the instruction to the jury as to the measure of damages in this:

(a) That the Court stated to the jury that in the event they found in favor of the plaintiffs that among the things they could consider were damages by reason of loss of companionship, society and comfort, and that such instruction implied that they could allow damages for the mental suffering and mental grief, and that said instruction contained no limitations as to what items of damages could not be considered by the jury.

III.

That the verdict returned by the jury in said cause was excessive in this:

That the amount of the verdict is not supported by the evidence and that the amount of the verdict is an amount not authorized or allowed by the measure of damages provided for by statute in such cases.

IV.

That the verdict rendered by the jury in the above cause was the result of mistake, passion, prejudice or improper motive, which is substantiated by the fact that the verdict returned by the jury is in excess of the amount of such judgment as provided for by law.

V.

That the verdict returned by the jury was also excessive and that bias and prejudice entered into the verdict as a matter of law.

VI.

That the verdict was excessive and the facts and circumstances and evidence were such as to incite bias and prejudice of the jury and that as a result thereof the verdict was unreasonably augmented.

VII.

The Court erred in giving the following instruction:

"You are instructed as a matter of law that Gary Checketts having no control or authority whatever as to the operation of the school bus, and not having participated in any way in the driving or the operation of the same, that any negligence on the part of the driver or operator of the school bus, if you find there was any negligence on his part, could not be imputed to the said Gary Checketts and he would not be guilty of contributory negligence by reason of any act of the operator of the school bus,"
for the reason that under the circumstances of the case the negligence of the school bus operator was imputable to the said Garry Checketts, and that the matter of imputed negligence was thus taken from the jury by such instruction.

Dated this 13th day of June, 1949.

/s/ O. R. BAUM,
BEN PETERSON,
Attorneys for the Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 13, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

There are two grounds urged in support of this motion for new trial:

First, that the Court failed to specially point out to the jury that it should not allow any damages for mental grief and anguish.

Second, that the verdict was excessive.

As to the first ground: At the time of the impanelling of the jury counsel were permitted to examine the jurors on matters not covered by the general examination of the Court, and at that time counsel for the defendant repeatedly explained to the jurors that damages for mental anguish and mental suffering could not be allowed in the event their verdict was in favor of the plaintiffs, and the jurors in reply to counsel's questions concerning this matter said they would not allow any damages for mental anguish and mental suffering. There was no objection by counsel for the plaintiffs to this line of questioning. Counsel for the plaintiffs, in his examination of the jurors agreed that the statement made by counsel for the defendant, to the effect that no damages could be allowed for mental grief and mental anguish, was correct. There being no dispute as to this matter the Court did not interfere.

At the completion of the evidence and prior to the submission of the case to the jury the Court called counsel into Chambers and went over all of

the instructions that were to be given, including the instruction as to the measure of damages. Counsel in their argument to the jury reminded the jurors of their answers to the questions propounded on voir dire examination and *av*ised the jury of the instruction it was about to receive, and the Court permitted this argument.

Without passing upon the question as to whether an instruction on this or other matters that should be excluded from their consideration should have been given, there can be no question but what the jury was fully advised that it must determine the damages to be allowed the plaintiffs as contained in the instruction given by the Court,—in the event its verdict was in favor of the plaintiffs.

The instruction as given does not include mental suffering as an element of damage and there is no suggestion on the part of counsel that the instruction as given does not include all of the elements of damage upon which an award may properly be allowed. The Court could have gone farther and entered into the field of all matters that should be excluded and which were not proper for their consideration. In such an instruction, however, a great many things could possibly have been overlooked.

In view of the fact that the jury was so fully advised that mental suffering and mental anguish would not be included in the instructions and what elements would be included, the Court is satisfied that the jury considered only those matters which were embraced in the instructions.

As to the second ground,—that the verdict was excessive. The general rule is: "The Court will not interfere in such cases unless it appears that the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice." There is no such showing here, and the Court, whatever his judgment personally might be, would not be justified in saying that the jury was wrong and attempt to correct the jury's verdict by substituting the judgment of the Court.

Motion for new trial will be denied and it is so ordered.

/s/ CHASE A. CLARK,
U. S. District Judge.

Dated August 18, 1949.

[Endorsed]: Filed Aug. 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Covey Gas and Oil Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 3rd day of June, 1949, and from the order entered in this action on the 18th day of August, 1949, denying the new trial, and from any judgment entered by reason of such order.

Dated this 2nd day of September, 1949.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant.

[Endorsed]: Filed September 6, 1949.

ORDER EXTENDING TIME FOR FILING APPEAL IN CIRCUT COURT

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to December 5, 1949.

Dated this 30th day of September, 1949.

/s/ CHASE A. CLARK,

U. S. District Judge.

[Endorsed]: Filed September 30, 1949.

In The United States District Court,
District of Idaho, Eastern Division.

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY OF IDAHO, a corporation,

Defendant.

TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, sitting with a jury, at Pocatello, Idaho on June 1, 1949

APPEARANCES

BEN W. DAVIS, ESQ.,
Pocatello, Idaho

LOUIS F. RACINE, ESQ.,
Pocatello, Idaho
Attorneys for the Plaintiffs,

O. R. BAUM, ESQ.,
Pocatello, Idaho

BEN PETERSON ESQ.,
Pocatello, Idaho
Attorneys for the Defendants.

June 1, 1949 1:30 p.m.

The Court: This case is at issue now and set for trial, the granting of this motion would mean the

vacating of the setting and putting it over for the term. I think the rule is well settled in Idaho that you can proceed against one or more of the tort feasors. I might be inclined to bring him in were it not for the fact that this motion is filed so late. There has to be a time when motions stop.

If this was on either of two grounds, jurisdiction or that the complaint didn't state a claim I would be inclined to grant the motion. The record may show that the motion is denied.

(Selection of Jury.)

June 2, 10 a.m.

(Opening statement by Mr. Davis.)

RALPH L. BOWMAN

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis

Q. State your name?

A. Ralph L. Bowman.

Q. Mr. Bowman, by whom were you employed on the 24th of February 1947?

A. Covey Gas and Oil Company. [3*]

Q. By whom are you employed now?

A. Myself.

Q. At that time what were your duties with the Covey Gas and Oil Company?

*** Page numbering appearing at bottom of page of original Reporter's Transcript.**

(Testimony of Ralph L. Bowman.)

A. I was assistant Manager of the Station at that time.

Q. On the day of the unfortunate occurrence to this boy the occurrence of the boy's losing his life, where had you been? A. McCammon.

Q. Who were you working for?

A. Covey Gas and Oil Company?

Q. As you came back who were you working for? A. Covey Gas and Oil Company.

Q. You had made such trips before?

A. Yes sir.

Q. That was within the scope and line of your duty? A. Yes sir.

Mr. Davis: That is all Mr. Bowman.

Mr. Peterson: No questions.

MYRON DAVIS CARTER

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis

Q. Will you state your name? [4]

A. Myron Davis Carter.

Q. I referred to you as Dick?

A. That is a nick-name I have had for a long time.

Q. Where do you live?

A. Thatcher, Idaho.

(Testimony of Myron Davis Carter.)

Q. How long have you lived there?

A. About six years.

Q. What is your occupation?

A. Farmer.

Q. Where were you on the 24th of February 1947 about four-thirty in that afternoon?

A. About four miles south of Pocatello.

Q. Where had you been?

A. American Falls to an auction.

Q. Who had you been with?

A. Mr. Eames.

Q. He was with you? A. Yes sir.

Q. What kind of conveyance were you in?

A. Automobile.

Q. Who was driving that automobile?

A. Mr. Eames.

Q. Where were you going?

A. South, for home.

Q. Did you notice a school bus. [5]

A. Yes sir.

Q. What was the condition of the road Mr. Carter? A. They were good.

Q. Dry or wet? A. Dry roads.

Q. What was the condition of the weather that afternoon? A. It was a nice afternoon.

Q. Clear? A. Yes sir.

Q. When did you notice the school bus?

A. We followed it for a mile or a mile and a half.

(Testimony of Myron Davis Carter.)

Q. What did it do from time to time?

A. Stopped to let children off.

Q. You know where Merridel Park is?

A. Yes sir.

Q. The scene of this accident? A. Yes sir.

Q. What happened at this place?

A. The bus stopped to let children off; the cars that were behind it stopped.

Q. How many cars?

A. As I recall one ahead of us and some cars behind us.

Q. Did all the cars proceeding in the direction you were going stop? A. Yes sir. [6]

Q. No cars back of the bus passed around?

A. No sir.

Q. Was there any conveyance or truck that came from the other direction? A. Yes sir.

Q. When did you first see that truck, how far away was it?

A. I could see the truck coming in front of the school bus about three blocks.

Q. How far was the road clear and straight to the south from where the bus stopped?

A. Three quarters of a mile.

Q. Approximately at what rate of speed was the truck you saw travelling?

A. Forty or fifty miles an hour.

Q. Did that truck stop? A. No sir.

Q. Did you see the school children getting off the bus? A. Yes sir.

(Testimony of Myron Davis Carter.)

Q. What did the children do after they got off the bus?

A. They started around back of the bus.

Q. The school bus was headed south?

A. Yes sir.

Q. Where did it stop with reference to its lane, —in reference to the lane of traffic?

A. In its lane, maybe a little to the right. [7]

Q. To the right? A. Yes sir.

Q. Were the children getting off that bus before you saw the truck coming? A. Yes sir.

Q. They were walking down the side of the bus?

A. Yes sir.

Q. Did that truck in any way slacken its pace?

Mr. Peterson: Objected to as leading.

The Court: It is somewhat leading.

Mr. Davis: Withdraw it.

Q. What happened?

A. The little boy I saw in the lead, in a hurry to get home, he ran around back of the bus, the truck came and I saw the little boy get hit before,—well he was out in the road and he got hit with truck, the truck picked him up and packed him quite a ways before it stopped.

Q. Which side of the truck struck the boy?

A. The right.

Q. As it was going north? A Yes sir.

Q. Which side of the truck struck the boy,— what part?

(Testimony of Myron Davis Carter.)

A. Between the lamp and the fender. [8]

Q. Did you notice any dent or damage?

A. The lamp was bent.

Q. Did you know or do you know how far the truck went before it stopped after hitting the boy?

A. I would say about thirty-five steps.

Q. About thirty-five steps? A. Yes sir.

Q. At the time the truck struck the boy what was its rate of speed as compared to the time you first saw it? A. About the same as when I saw it.

Q. It had gone north of the bus and hit the boy as he crossed the road? A. Yes sir.

Mr. Peterson: Objected to as suggestive and leading.

The Court: The question was answered.

Q. Did you observe any lights or anything on this school bus, Mr. Carter?

A. Yes sir, blinker lights were on and off.

Q. What do you mean by on and off?

A. They would come on and go off.

Q. Did you hear anything with reference to any brakes? A. Not until after it hit the child.

Q. Then what did you hear?

A. I heard brakes.

Q. What were they doing? [9]

A. They were squealing, you know how brakes do.

Q. What kind of truck was this?

A. Gasoline truck I would call it,—a Federal truck, a red truck.

(Testimony of Myron Davis Carter.)

Q. With reference to the cab on it, would it be higher or lower than the front side of a touring car?

A. It would be higher.

Q. How long did you stay there Mr. Carter?

A. Until the school bus driver gave us permission to go.

Q. Before you left did you get that permission?

A. Yes sir.

Q. Did anyone come there while you were there?

A. Patrolman came and picked the boy up and took him to the hospital.

Q. Did you see any officer there making measurements? A. Not that I recall.

Q. You had gone at that time?

A. Yes sir.

Q. Mr. Carter, what color was this school bus?

A. Orange with black lettering.

Q. What sign or signs were on the back of it?

A. Stop and Independent School District I think was on it.

Q. How far in your judgment after the truck struck the boy—what happened to the boy?

Mr. Peterson: That has been asked and answered.

The Court: He may answer. [10]

A. The boy glued to the front of the truck until the truck slowed down and let him roll off.

Q. How far did he roll, in your opinion?

A. I would say about thirty-five or forty feet.

(Testimony of Myron Davis Carter.)

Q. Do you know of your own knowledge that the boy was dead when they took him away?

A. I didn't get right to the boy but I imagine he was dead.

Mr. Davis: That is all.

Cross-Examination

By Mr. Peterson

Q. Do you remember now the approximate width of the oiled portion of the highway?

A. Approximately twenty feet.

Q. Do you have in mind the approximate width of the shoulder on the west?

A. About four or five feet.

Q. West of the oiled surface? A. Yes sir.

Q. Are you reasonably sure of those measurements?

A. That is my guess.

Q. What is the width and condition of the roadway on the east from where the accident happened?

A. On the east there is a sort of driveway, I imagine fifteen or twenty feet of shoulder there.

Q. A driveway on the east? [11]

A. Yes sir.

Q. Is that an open driveway? A. Yes sir.

Q. Did you at the time you stopped behind the school bus see any arms sticking out from the bus?

A. I don't recall.

Q. You didn't see any, is that right?

A. That's right.

(Testimony of Myron Davis Carter.)

Q. How close were you parked behind the bus?

A. The second car, well out to the right.

Q. Approximately how many feet between your car and the back end of the school bus?

A. Twenty feet.

Q. Would you say there were no arms sticking out from the school bus?

A. No, I wouldn't say that.

Q. You didn't see any?

A. No sir, I didn't see any.

Q. Which side of the car in which you were riding were you sitting?

A. On the right.

Q. Who was driving? A. Mr. Eames.

Q. Did you see any arms sticking out the right side of the bus? [12]

A. Not other than the door.

Q. Did you see blinker lights on the front of the bus? A. When we passed.

Q. When was that?

A. When we got permission to go, we looked back.

Q. They were blinking?

A. Yes sir.

Q. You are sure of that? A. Yes sir.

Q. You turned around so that you could see, and you saw them? A. Yes sir.

Q. What color was that Covey Truck?

A. It was red with white lettering if I recall right.

(Testimony of Myron Davis Carter.)

Q. Red with white lettering? A. Yes sir.

Q. Did you see this gentleman out there that day?

A. Quite a few out there, I wouldn't recall,—if he was the driver I saw him out there before we left.

Q. Do you know what he did after the accident?

A. No.

Q. Did he stay there?

A. Yes sir, he did for a time, we went just as they left with the boy, I wouldn't say whether he went with the boy or stayed with the truck.

Q. Did you see him with the highway patrolman after the [13] accident?

A. No we didn't, we had gone back to the car at that time.

Q. Did you see the highway patrolman there after the accident?

A. After the accident he was the one that came by.

Q. You saw the highway patrolman after the accident? A. Yes sir.

Q. Now, these distances, you testified that you made no measurements?

A. That's right, they are approximate.

Q. They are guesses? A. Yes sir.

Q. The speed of the truck to which you testified was likewise a guess? A. It is an estimate.

Q. You were on the right side of the car in which you were riding? A. Yes sir.

(Testimony of Myron Davis Carter.)

Q. How could you see the gas truck if you were behind the school bus?

A. We were quite a ways back.

Q. When did you see the truck?

A. About a quarter of a mile down the road.

Q. You didn't have any idea of the speed at which he was travelling?

A. Approximately,—that is as long as it took to go go that distance. [14]

Q. You didn't see it travelling from the time you first saw it until he got to the school bus?

A. Not all of the time.

Q. Your testimony is a pure guess as to the speed?

A. I could tell from the time it took to get over to the bus.

Q. You mean you could tell how fast that was going by telling the time it passed the bus after seeing it on top of the hill?

A. And how fast it was going when it passed the bus and how long it took, and how far it was.

Q. You got only a glimpse of it as it went by going North? A. Yes sir.

Q. Who was sitting between you and the truck at the place where you could see the truck?

A. Mr. Eames.

Q. Who else? A. That is all.

Q. You and Mr. Eames were together?

A. Yes sir.

Q. Wasn't there a car that parked in front of

(Testimony of Myron Davis Carter.)
the car in which you were riding and immediately back of the bus? A. Yes sir.

Mr. Peterson: I believe that is all. [15]

Redirect Examination

By Mr. Davis.

Q. You were asked with reference to the distance on the west side of the road, by that you mean the side the school bus was on,—the West side was the side the Bus was on? A. Yes sir.

Q. And the distance on the east side,—that would be the side that the oil truck was coming down? A. Yes sir.

Q. On the east side of the road there is a driveway? A. Yes sir.

Q. An open place and much more space than there is on the westerly side? A. Yes sir.

Mr. Davis: That is all.

Mr. Peterson: Yes, that is all.

WALDO EAMES

called by the plaintiff as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis.

Q. Your name is Waldo Eames?

A. Yes sir. [16]

Q. Where do you live? A. Preston.

Q. What is your business?

(Testimony of Waldo Eames.)

A. Ranching, farming and stock buying.

Q. You have been subpoenaed here?

A. Yes sir.

Q. You are not related to either of the Plaintiffs? A. No, I am not.

Q. Where had you been on the 24th day of February 1947 prior to the hour of four-thirty in the afternoon, Mr. Eames?

A. American Falls, to an auction sale.

Q. What was with you that afternoon?

A. Davis Carter.

Q. What time did you leave Pocatello that afternoon, on your way home?

A. About four o'clock, I know the children were out of school.

Q. The children were out of school?

A. Yes sir.

Q. Did you observe a school bus?

A. Yes sir.

Q. Where was that?

A. As we left Pocatello, I could see the school bus ahead of us, we were south of Pocatello.

Q. Did you follow that bus? [17]

A. Yes sir.

Q. What did that bus do from time to time?

A. Stopped to let children off; signalled for a stop with its light.

Q. Do you know what the bus did at Meridell Park or the Owl Club?

A. It pulled up to a stop to let the children off.

(Testimony of Waldo Eames.)

Q. Did you see the children getting off.

A. Yes sir.

Q. What did you do?

A. As the bus started to slow I pulled out to the side of the road to let the oncoming traffic see the signals. I was stopped off on the shoulder behind the bus?

Q. How many other cars were stopped there behind the bus? A. Four or five.

Q. Did you see any truck or vehicle approaching from the south? A. Yes sir.

Q. How far is your vision,—strike that,—for what distance to the south could you see the highway clearly?

A. I would judge near three-quarters of a mile.

Q. Was it straight? A. Yes sir.

Q. Now Mr. Eames, when did you first see this truck or oil tanker or truck coming from the south?

A. I saw it coming as the top of the cab showed over the hill?

Q. That would be approximately three-quarters of a mile away?

A. Yes sir, I guess about that.

Q. Had the school bus stopped then.

A. Yes sir, we had just stooped then.

Q. Was there any other vehicle or truck coming from the south and going north except this oil truck at that time? A. No sir.

Q. What was the fact with reference to the cars traveling south, did they stop?

(Testimony of Waldo Eames.)

A. I was next to the bus until a Montana car came up and noticed the light and ducked in front of me and behind the bus.

Q. Did you notice a state patrolman?

A. Yes sir, they pulled into line.

Q. What do you mean by that?

A. They pulled in the line behind the bus.

Q. What was the approximate speed of the truck as it approached the bus?

A. Forty-five or fifty miles an hour, I would judge.

Q. Tell us what happened there?

A. The children stepped off the bus and walked back to the back of the bus and turned to cross back of the bus and one little fellow was a step or two ahead of the [19] others and he started off a little faster across the road just in time for the truck to contact him when he went past there with his right front lamp and fender.

Q. Did you notice any slackening of the speed of the truck before he was hit?

A. No sir I didn't, I made the statement to Mr. Carter——

Judge Baum: Just a minute, I will have to object to what he——

Mr. Davis: Yes, that might be hearsay.

The Court: Go ahead.

Q. What was the statement that you made at the time there?

Mr. Peterson: Now, Your Honor, we object to this as incompetent, irrelevant and immaterial.

(Testimony of Waldo Eames.)

The Court: I think possibly the statement he made might be objectionable, he may state what he saw there. You can ask him what he saw?

Q. What happened.

A. I made the statement to Mr. Carter——

Mr. Davis: Not what you said to Mr. Carter, what you saw Mr. Eames.

A. What I saw—when I looked after the first contact, the boy was stuck to the side, side of the truck, it was the right side with his head against the fender and lamp and stuck there like a piece of paper as they whizzed by our car. [20]

Q. Did you make any measurements as to how far that truck went after it struck the boy?

A. I would estimate thirty-five paces.

Q. That is how far the truck went?

A. After he hit the child.

Q. Tell us how far, in your judgment, how far the boy stayed stuck to the front of the truck?

A. I would judge it was twenty-five feet past then I heard the brakes of the truck with the little boy and then he rolled toward the north and the center of the road fully twenty feet, then the traffic officer gathered him up in his arms.

Q. When the brakes were applied, the truck slowed down? A. Yes sir.

Q. Was that at the time the boy came off?

A. Yes sir, the time the body rolled on.

Q. What kind of noise did the brake make?

A. Screeched.

(Testimony of Waldo Eames.)

Q. Did you see any lettering on the bus?

A. Yes sir.

Q. What was it?

A. It was a school bus, and it has stamped on it "school bus" and on the side "Independent School District Number One".

Q. Can you give us an estimate of the length of the bus?

A. The body about twenty-five or twenty-six feet, maybe longer, but about that and the entire thing about thirty-two [21] or thirty-four feet.

Q. What color was it painted?

A. Orange and black.

Q. Was the lettering and words stamped on it plainly visible? A. Yes sir.

Q. What was the condition of the road?

A. It was dry.

Q. And what about the weather as to being clear or cloudy? A. It was clear.

Q. When did you leave there?

A. I talked to the school——

Judge Baum: Just answer the question.

A. After I received permission from the school bus driver. I asked if there was anything I could do and he said "no" to go ahead.

Q. You thought you should get permission to go?

A. Yes sir.

Mr. Davis: That is all Mr. Eames.

Cross-Examination

By Judge Baum:

Q. You were driving what kind of car?

(Testimony of Waldo Eames.)

A. A Pontiac 1940 Model.

Q. A yellow one? A. Tan.

Q. You left Pocatello at what time? [22]

A. About four o'clock.

Q. Mr. Carter was with you? A. Yes sir.

Q. In the front seat with you? A. Yes sir.

Q. As you went down the highway to where the accident happened how fast were you travelling?

A. Fifteen or twenty miles an hour.

Q. How far away were you when you first saw the cab of the truck coming over the hill.

A. How far from the school bus?

Q. Yes.

A. We were approximately a hundred yards.

Q. Back of the school bus? A. Yes sir.

Q. You saw the cab of the truck as it came over the hill coming north?

A. That is the first I noticed.

Q. Did you keep your eye on the truck?

A. No.

Q. When did you see it the next time?

A. I pulled the car off the side of the road and saw it until the vision stopped between me and the school bus.

Q. Did you pull out of your line of traffic?

A. Yes sir, off the oil. [23]

Q. How wide was the road beyond the oil on the west side? A. Five feet or more.

Q. How far back of the school bus did you stop?

A. I was, I would say about twenty steps.

(Testimony of Waldo Eames.)

Q. That would be sixty feet.

A. Fifty or sixty.

Q. Another car pulled in ahead of you?

A. Yes sir, he was about to go on and he saw the lights. It was a Montana car, it was a coupe, light, black coupe.

Q. Light, black?

A. Light in weight and low down, one of the new Studebakers.

Q. He pulled ahead of you?

A. Yes sir, down this highway to the corner of the school bus.

Q. He was in the line of traffic?

A. He had two wheels on the oil.

Q. How far ahead of you did he stop?

A. I would judge he was fifteen feet or more.

Q. Ahead of you? A. Yes sir.

Q. And you were back of the school bus how far did you say, about thirty paces.

A. I would judge about twenty steps.

Q. And he was five or six paces ahead of you?

A. About fifteen feet, it looked like about five steps ahead of the car. [24]

Q. As this truck passed the school bus—withdraw that—Now this school bus opened on what side? A. The right hand side.

Q. West side? A. Yes sir.

Q. At the front or the side? A. The front.

Q. How many children got off, do you know.

(Testimony of Waldo Eames.)

A. It was either four or five, I wouldn't be exact on that.

Q. Where did they go?

A. Walked back toward the north on the west side of the school bus and then across toward the east at the back, toward the opposite line of traffic?

Q. Did you see the truck hit the boy?

A. Yes sir.

Q. It carried him how far?

A. Twenty feet or more.

Q. Then the brakes were applied?

A. Yes sir, that is when I heard the brakes.

Q. The boy was on what side of the truck?

A. The right.

Q. East side? A. Yes sir.

Q. The truck was between you and the boy?

A. Yes sir, after it hit I saw clearly, the boy pasted on. [25]

Q. Did I ask you that—just answer the question.

A. Yes sir.

Q. The radiator of the truck was between you and the boy? A. Yes sir.

Q. You saw the boy roll, notwithstanding the fact that the truck was between you?

A. The truck pulled off to the right, the boy rolled down this like of traffic direct to the center and rolled over to the side like you would roll a ball.

Q. When did the oil truck leave its lane of traffic with reference to where your car was standing?

A. It was down the road.

(Testimony of Waldo Eames.)

Q. How far?

A. Ie looked like it took off about the time he applied the brakes.

Q. About twenty-five feet after it hit the boy, you said, he applied the brakes? A. Yes sir.

Q. You were about twenty paces back of the bus?

A. About twenty-five steps or twenty steps.

Q. After the truck passed you the boy rolled off the truck into your lane of traffic?

A. Down the center to the right, toward the west of the traffic.

Q. To what portion of the truck did you see the boy adhering?

A. The center with his head bent toward the head lamp—sort [26] sort of toward the head lamp and fender.

Q. Did you go down to see the truck?

A. Yes sir, passed two cars and a pickup.

Q. To the front of the truck?

A. To the side where I could see the front, I didn't walk around it.

Q. Yoy didn't walk around?

A. I walked around to the front so it was clear—the front of the truck was clear to me.

Q. Isn't it a fact that when this truck stopped the boy dropped off the bumper, right in front of the truck, and didn't roll at all?

A. I sure saw him roll. When the officer picked him up he had just stopped.

Q. What officer picked him up?

(Testimony of Waldo Eames.)

A. It was the patrolman in uniform.

Q. Do you know this gentleman sitting here (indicating)? A. No sir.

Q. Did you see him before?

A. Yes sir, out there.

Q. Isn't it a fact that Mr. Bowman picked the boy up? A. Oh, no.

Q. Isn't it a fact that Bowman put him in the car and the officer was never out of his car?

A. I didn't see him pick him up.

Q. Why did you say the officer picked him up?

A. I didn't see Mr. Bowman.

Q. Did you see the officer pick him up?

A. I saw two officers with a quilt or something and they gathered, or rather covered him up with it.

Q. You saw two officers in uniform?

A. One officer in uniform before two men came out.

Q. The officer did what?

A. He had a tarp or something and covered the boy up.

Q. Both these men that came out did they have uniforms?

A. No, I remember one in full dress uniform.

Q. You saw that policeman drive up in this lane of traffic?

A. His car stopped back of us in this line of traffic.

Q. How long before the accident did this patrolman stop?

(Testimony of Waldo Eames.)

A. Before the accident—I didn't see him before the accident.

Q. How do you know he drove up and stopped in the line of traffic?

A. I saw the car but it was after the accident.

Q. You saw the car pull up in the line of traffic, the line of cars waiting and stopped?

A. Yes sir.

Q. Did that occur before the boy was hit?

A. I think afterward.

Q. Isn't it a fact that the patrolman drove down turned around and stopped by the boy—where the boy was lying?

A. I didn't stay long enough to know whether it was the [28] Sheriff, so far as the officer I know he was in uniform.

Judge Baum: That's all.

Mr. Davis: That's all Mr. Eames.

The Court: We will recess for fifteen minutes.

11:30 A.M., June 2, 1949

Mr. Davis: May I recall Mr Eames for another question or two.

The Court: You may.

WALDO EAMES (Recalled)

Redirect Examination

By Mr. Davis

Q. Mr. Eames, you testified on cross-examination that you saw an officer in uniform?

(Testimony of Waldo Eames.)

A. Yes sir.

Q. You testified with reference to the officer taking the child? A. Yes sir.

Q. What do you mean by him taking the child?

A. He took him in the car.

Q. You mean——

Judge Baum: We object to what he means, he can state what occurred.

The Court: Let the witness explain.

A. He took him with him in the car, I misunderstood when he said Mr. Bowman took him, I saw the officer take him in the car. [29]

Q. Did you understand that meant that Bowman took him in his car?

Judge Baum: Objected to as leading, I talked about picking him up.

The Court: Witnesses have a hard time on the witness stand, and I think he may answer and explain if he has any explanation he wants to make.

A. What I meant to say was I saw the officer take him, I meant the officer took him in the car.

Q. What did you mean when you said the officer picked him up in a tarp.

A. The officer took him in the tarp.

Q. And he put the boy in the car?

A. He took the boy in the car.

Q. (By Judge Baum): This tarp where did you see this?

A. They had something over him.

Q. You testified they had a tarp?

(Testimony of Waldo Eames.)

A. I said at first a quilt, they had a piece of material.

Q. Was that in the car or out on the road?

A. They wrapped it around the boy.

Q. In the car or when?

A. It looked like they wrapped it around him and put him in the car.

Q. They wrapped it around him while he was out of the car? [30] A. Yes sir.

Q. In whose arms was it?

A. In whose arms. It was either the truck driver or another man standing there.

Q. Where was the other officer, you said there was two? A. I saw one man in full uniform.

Q. Then he took this boy in his car?

A. I said the officer took him in the car with him, that is what I meant to say.

Judge Baum: That is all.

Mr. Davis: Yes, that is all.

MR. BISCHOFF

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis:

Q. Where do you live Mr. Bischoff?

A. McCammon.

Q. And your business? A. Farming.

Q. How long have you lived at McCammon?

(Testimony of Mr. Bischoff.)

A. Ten years.

Q. Do you know or are you related to Mr. or Mrs. Checketts? A. No sir.

Q. You have been subpoenaed here to testify?

A. Yes sir.

Q. You have no interest in this matter?

A. None whatever.

Q. Where were you about four-thirty o'clock P. M. on the 24th of February 1947?

A. On the way home.

Q. Where had you been? A. To Pocatello.

Q. Did you see anything unusual happen?

A. Yes sir.

Q. An accident? A. Yes sir.

Q. Did you see a school bus? A. I did.

Q. Did you see it after you left Pocatello that afternoon? A. Yes sir.

Q. And had you seen the school bus before the accident? A. Yes sir.

Q. Had you been following it? A. Yes sir.

Q. What is the fact as to whether it stopped previous to this time? A. At least twice.

Q. Had you stopped each time?

A. Yes sir. [32]

Q. What is the fact as to whether you saw any stop sign any painting when it stopped?

A. Stop sign on the bus showed.

Q. Were there any blinker lights?

A. Yes sir.

Q. What were they doing? A. Blinking.

(Testimony of Mr. Bischoff.)

Q. You know what we are talking about and where the accident happened? A. Yes sir.

Q. Where were you at that time?

A. I was in my pickup.

Q. Who was with you? A. My wife.

Q. Where were you from the school bus?

A. I was the third or fourth car. Three or four cars, I think the third car back.

Q. What happened when the school bus stopped?

A. Four children got off.

Q. Which side did they get off?

A. The right hand side.

Q. What did you see them do?

A. They started around to the back of the bus.

Q. Are you able to estimate the length of that bus from where they got off to the back of it?

A. About thirty feet. [33]

Q. Were there any cars going in the same direction as the bus that did not stop? A. No sir.

Q. What condition were the roads in that day?

A. Good and dry.

Q. What was the weather at that time?

A. It was clear.

Q. Was the sun shining?

A. It was shining.

Q. How far south and past the school bus could you see down the road?

A. Possibly a half mile.

Q. What is the fact as to whether the road is straight for that distance? A. It is straight.

(Testimony of Mr. Bischoff.)

Q. In which line of traffic was the school bus stopped? A. The right hand lane.

Q. Where with reference to the oil, the right hand wheels of the bus—strike that please—where were the wheels with reference to the pavement?

A. Just on the pavement.

Q. Did the children get off on the pavement or on the shoulder? A. On the shoulder.

Q. Did you see a truck approaching from the south? A. I did. [34]

Q. Did you see more than one vehicle approaching from the south at that time? A. Just one.

Q. How fast was it travelling?

A. That is hard to answer.

Q. In your best judgment?

A. Forty-five miles.

Q. Forty-five miles an hour? A. Yes sir.

Q. What did it do as it approached the school bus?

A. Didn't do anything, just kept coming.

Q. Just kept coming? A. Yes sir.

Q. What happened?

A. This little boy ran behind the bus, started to cross the road and just as he got to the back of the bus the truck was there at the same time and hit him.

Q. What did the truck do after it hit him?

A. Kept on coming.

Q. Did you make any estimate or do you have any judgment as to how far the truck went after it hit him before it stopped?

(Testimony of Mr. Bischoff.)

A. That is hard to say—I would say between a hundred and forty and a hundred and fifty feet.

Q. That is your best judgment?

A. Yes sir. [35]

Q. What happened to the boy when the truck first hit him, where did he stay?

A. On the bumper for a ways.

Q. Then what happened?

A. He skidded along in front of the front wheel of the truck before he rolled to one side.

Q. What color was that school bus?

A. Orange and black.

Q. Any lettering on it?

A. "Independent school district".

Q. Any words—anything with reference to "stop"? A. "Stop" on the back and lights.

Q. Were they plainly visible? A. Yes sir.

Q. Do you or are you able to give an estimate of what was the height of the bus?

A. The top of the bus?

Q. From the ground to the top of the bus?

A. I would say about eight feet.

Q. Which side of the truck did the boy strike, or which side struck the boy?

A. Mostly the right hand side, two-thirds of the way probably.

Q. How long did you stay there?

A. I don't know. Possibly ten minutes after.

Q. Had any officers come before you left?

A. Yes sir. [36]

(Testimony of Mr. Bischoff.)

Q. Were they making any measurements before you left? A. No sir.

Q. Did you see anyone there in uniform?

A. Yes sir.

Mr. Davis: That is all, thank you Mr. Bischoff.

Cross-Examination

By Mr. Peterson:

Q. When was it you first noticed this bus after you left Pocatello? A. This school bus?

Q. Yes. A. Probably a mile out of town.

Q. At that time how many cars were between you and the school bus?

A. Three—no, two I think.

Q. Do you know who was driving those cars?

A. No, I don't.

Q. Did these two cars remain in front of you up until the time of the accident? A. No sir.

Q. What happened?

A. One went around the school bus.

Q. At what point?

A. After the first stop I think. [37]

Q. After the first stop was there one car between you and the bus? A. Yes sir.

Q. Did that remain between you and the bus until the accident? A. Yes sir.

Q. Where did the other car come in front of you, between you and the bus?

A. It was the car with the Montana license.

Q. It pulled ahead of you.

A. No, it was the second car ahead of us.

(Testimony of Mr. Bischoff.)

Q. As the bus approached Meridell Park by the Owl Club, how far back of the bus did you stop?

A. Possibly a hundred feet.

Q. How far ahead of you was this first car?

A. Seventy or eighty feet.

Q. Then the other car, how far ahead of that car was the Montana car?

A. Fairly close to it.

Q. You think you were about—withdraw that—was the car ahead of you driven by Mr. Eames?

A. I didn't see Mr. Eames there.

Q. Was it a tan Pontiac? A. Yes sir.

Q. You were seventy feet back of this tan car?

A. Yes sir. [38]

Q. Were you on the pavement or off?

A. Off to the side of the pavement.

Q. Where was the tan car?

A. Off the pavement.

Q. Where was the Montana car?

A. On the edge of the pavement, the right hand front was pretty well to the edge, to the right edge of the road.

Q. You didn't see any car parked off on the shoulder? A. No sir.

Q. When did you notice this oil truck?

A. A little while before I stopped.

Q. It would be rather difficult to tell the speed of that truck? A. That's right.

Q. A car coming toward you it is hard to tell its speed? A. Yes sir.

(Testimony of Mr. Bischoff.)

Q. It could have been going twenty-five miles an hour? A. No, it was faster than that.

Q. How far down the road was it when you first saw it? A. About half a mile.

Q. Was the bus stopped at that time?

A. Yes sir.

Q. Were the children out of the bus?

A. They were getting out.

Q. When the truck was a half mile down the road? [39]

A. Yes sir.

Q. How many children?

A. Three or four.

Q. Was there a lapse of time before all the children—withdraw that,—was there a lapse of time between the children getting off the bus?

A. They got off pretty well together.

Q. Where did they go?

A. They stood by the bus a minute or so?

Q. They were all off the bus before any started around it? A. That's right.

Q. They were all off before any started around the bus? A. Yes sir.

Q. Did you notice a rather large boy getting off the bus?

A. Not so very large, I noticed one boy?

Q. Tell the jury the type of children that got off the bus?

A. They were from about ten to fourteen or so.

Q. About the same size?

(Testimony of Mr. Bischoff.)

A. Fairly well the same size, pretty well.

Q. After standing there two or three minutes they started back of the bus?

A. They started toward the back of it.

Q. How many started toward the back of it?

A. It seemed to me there was three of them.

Q. Were those three together? [40]

A. Yes.

Q. Could you see them as they got back of that school bus? A. Yes sir.

Q. No cars between you and the school bus?

A. Two.

Q. But you could see them walk around the bus?

A. That's right.

Q. Those cars were between you and the bus?

A. Yes sir.

Q. How many approached on the highway back of the bus?

A. I noticed some cars.

Q. I mean children.

A. I saw three children.

Q. After you saw them go back of the bus into the lane of traffic were the three together?

A. No, just one.

Q. You saw the *bus* hit the boy? A. I did.

Q. You say it was about half between the middle of the radiator and the right fender?

A. That's right.

Q. Where was the boy when the truck passed you?

(Testimony of Mr. Bischoff.)

A. Ahead of the truck front wheel on the pavement skidding along.

Q. They had travelled about eighthy or seventy feet before [41] it got to you?

A. Around a hundred.

Q. And it travelled how much farther?

A. Probably fifty feet.

Q. Then what happened?

A. Well, I noticed the state patrol car.

Q. Did the truck stop. A. It did.

Q. Where did the truck stop in reference to the boy's body?

A. That is rather hard to say, I think about ten feet back of where the boy stopped.

Q. Were you in the car or out at that time?

A. In the car.

Q. The truck was between you and the boy's body? A. No.

Q. The body was on the pavement?

A. Yes sir.

Q. Was there any car back of you that stopped?

A. Yes sir.

Q. How many cars back of you that stopped?

A. Around three or four.

Q. About seven cars all told? A. Yes sir.

Q. Did you see the patrolman drive up?

A. I did. [42]

Q. When did he drive up in reference to the time of the accident?

A. Just as it happened.

(Testimony of Mr. Bischoff.)

Q. He didn't stop in the line of traffic?

A. I don't know, he was by the boy.

Q. Do you know who picked the boy up?

A. No sir.

Q. You know Mr. Bowman? A. I don't.

Q. You saw him there? A. Yes sir.

Q. Did he pick the boy up?

A. I couldn't say.

Q. Did you get out of your car?

A. Not until after they picked the boy up?

Q. Who took him?

A. The State patrol car.

Q. Who carried him to the car?

A. I couldn't say.

Q. Did the officer carry him to the car?

A. I couldn't say.

Q. Did you see any tarp there?

A. I did not.

Q. You think this bus is about eight feet high from the ground?

A. From the ground to the top. [43]

Q. That's right? A. Yes, I think so.

Q. This word "stop" was that on the light?

A. The stop sign just above the light.

Q. Just above the light. A. Yes sir.

Q. It is not on the light? A. No.

Q. Where is the light?

A. On the left hand side.

Q. The left hand side? A. That's right.

Q. One light there?

(Testimony of Mr. Bischoff.)

A. Several on the back of the bus.

Q. Describe them. This "stop" is where with reference to the back of the bus?

A. On the left hand side.

Q. Is it on the light or painted?

A. One painted and stop sign on the light.

Q. There is a painted sign on the left hand side?

A. As near as I remember.

Q. There is "stop" on the glass?

A. Yes sir.

Q. How many lights had "stop" on?

A. One. [44]

Q. Where is that? A. On the back light.

Q. Where was the light that had the word "stop" on it located?

A. On the left hand side.

Q. On the left side? A. Yes sir.

Q. There were some other lights,—what were they? A. Blinker lights.

Q. Where were they?

A. On the back of the bus.

Q. How were they located on the back?

A. I think there were some on the body and some on the bottom.

Q. Some of them on the back and some on the bottom? A. Yes sir.

Q. How many blinker lights on the top?

A. I couldn't say.

Q. Was there one of more?

A. I think about two.

(Testimony of Mr. Bischoff.)

Q. How many on the bottom?

A. I think about one or two.

Q. About one. A. Yes.

Q. This one on the bottom of the bus body where was it? A. I couldn't say.

Q. Where was it located from this stop light?

A. It is over a ways, I think they had them on each corner, [45] the same as trucks.

Q. You think there was three blinker lights, two up and one lower? A. Yes.

Q. Were those stop lights working?

A. They were.

Q. Were the blinker lights working?

A. Yes sir.

Q. Working at the time of the accident?

A. They were.

Q. Was there a side-arm on this bus?

A. I couldn't say.

Q. Was it working? A. I couldn't say.

Q. When you drove by did you see one?

A. I think I did.

Q. Was it up?

A. I am not sure, I think it was.

Q. You say the time you passed that bus you saw the side-arm on the bus?

A. Yes, I think I noticed that.

Q. You don't know whether it was up or down?

A. No sir, I couldn't say.

Q. What side was it on?

A. The left hand side, on the front.

(Testimony of Mr. Bischoff.)

Q. Did you see lights on the front of the bus?

A. No.

Q. Don't know whether there was any there or not? A. No sir, I couldn't say.

Q. You think you were there about ten minutes? A. Yes, as near as I can tell.

Q. None of the officers had come to the scene at the time you left, other than this patrolman?

A. No sir, no others.

Mr. Peterson: That is all.

Redirect Examination

Q. Mr. Bischoff, the question was propounded to you by counsel that stated "did you see the bus hit the boy" and you answered "yes". What did you mean hit him? A. The truck.

Mr. Peterson: I meant to say the truck.

Mr. Davis: That is what I thought.

Q. You testified that the children stopped a little bit, I think you said possibly a minute.

Mr. Peterson: Objected to that is not what the record shows.

The Court: I think the witness so testified.

Q. Is that what you testified to? A. Yes.

Q. Then you were asked the question "the children stopped two or three minutes" and you answered "yes" did you mean they were three minutes,—strike that,—did you mean that they were there two or three minutes,—did you mean to answer that question in that way?

(Testimony of Mr. Bischoff.)

A. No sir, not in front of the bus.

Q. And your testimony is that the children were there about a minute? A. Yes sir.

Q. This thing you saw on the side of the bus did it have orange rings around it?

A. Yes sir.

Mr. Davis: That is all.

Recross-Examination

By Judge Baum:

Q. How long was it?

A. Possibly a foot and a half.

Judge Baum: That's all.

Mr. Davis: Yes, nothing more.

The Court: We will recess at this time until 1:30.

1:30 P.M. June 2, 1949

MRS. MARGARET BISCHOFF

Called by the plaintiffs as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis: [48]

Q. Will you please give your name?

A. Margaret Bischoff.

Q. Mrs. Bischoff, you have never been a witness in any case before? A. No sir.

Q. You are fearful of being a witness?

A. Rather, yes.

(Testimony of Mrs. Margaret Bischoff.)

Q. I will ask the questions briefly. Your husband testified this morning? A. Yes sir.

Q. You were riding with him when the accident happened to the little boy? A. Yes, I was.

Q. Tell us in your own language what you saw?

A. We were coming home from Pocatello; we stopped behind this school bus. It stopped twice,—this truck came toward the bus and this little fellow came from behind the bus and it hit him.

Q. What happened at that time?

A. I cannot tell you, I threw my hands over my face I couldn't watch it. When things like that happen you cannot watch it.

Q. You don't know what happened after the boy was struck? A. No, I couldn't tell you.

Q. How far could you see the truck? [49]

A. Quite a distance.

Q. Do you know whether it slackened up its rate of speed?

A. No, it didn't until after it hit the boy?

Q. Did you observe anything on the bus?

A. Yes sir, blinking lights like all school buses do, and this great big "stop" in black letters.

Mr. Davis: That is all.

Cross-Examination

By Judge Baum:

Q. How did you know the truck didn't slow up until after it struck the boy?

A. It was coming at a good gait and it didn't throw on its brakes until after it hit.

(Testimony of Mrs. Margaret Bischoff.)

Q. Not knowing how fast it came how could you tell it didn't slow up?

A. I don't think he did.

Q. You don't know.

A. I don't think he slowed up.

Q. Those lights were on the back of the bus?

A. Yes sir.

Q. And this painted sign? A. Yes sir.

Q. How many blinking lights were there?

A. I couldn't say.

Q. They were blinking? [50] A. Yes sir.

Q. You drove away with the lights blinking?

A. No, we stayed until they told us that we could go.

Q. Were the lights blinking when you left?

A. I think so. I saw them blinking.

Mr. Baum: That's all.

Mr. Davis: That's all thank you Mrs. Bischoff.

REED HOWE

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name please? A. Reed Howe.

Q. Where do you reside?

A. 1165 South 8th East Salt Lake City, Utah.

Q. You are married? A. Yes sir.

Q. You formerly lived in Pocatello?

(Testimony of Reed Howe.)

A. Yes sir.

Q. Mr. Howe, on the 24th day of February 1947 what was your occupation at that time?

A. Idaho State patrolman.

Q. What we call a traffic officer? [51]

A. Yes sir.

Q. Mr. Howe, calling your attention to the time, approximately 4:30 of that date near Meridell Park do you remember being there and do you remember something unusual that happened?

A. Yes sir.

Q. What was the condition of the roads that day? A. They were dry.

Q. They were dry? A. Yes sir.

Q. What was the condition of the weather?

A. It was a clear day with the sun shining.

Q. Do you have in mind and do you know where the school bus stopped that day? A. Yes sir.

Q. South from that bus how far was the road straight.

A. About, maybe little less than half a mile.

Q. Could you see clearly down that stretch of road for that distance? A. Yes sir.

Q. Tell us what you saw happen there?

A. I saw the school stopped and some cars behind it. I saw some children get off and one of the children ran around behind the bus and a truck was coming from the south going north and hit this child.

Q. Which side of the highway or which lane of

(Testimony of Reed Howe.)

traffic [52] was the truck in which hit the boy?

A. In the east going north.

Q. On the right hand side in the correct lane?

A. Yes sir.

Q. Which side of the bus?

A. He was on the west side in his right lane of traffic.

Q. In his right lane of traffic? A. Yes sir.

Q. Can you tell us approximately where the truck was at the time you saw the children getting off?

A. He was coming from the south, as I recall there is a gradual slope just before it gets to the hill, he was about half way down this slope toward the bus.

Q. That would be about a quarter mile away?

A. Yes sir about a quarter.

Q. At that time the children were off and by the bus? A. Yes sir.

Q. How far back of the bus were you when you saw it was stopped?

A. At least half a mile, maybe a little less.

Q. You kept driving toward the bus?

A. Yes sir.

Q. What is the fact as to whether you had come to a complete stop at the time you saw the accident?

A. I was still driving south. After seeing the accident I [53] went up between these cars and turned around facing back toward town.

Q. Where was the boy at that time?

(Testimony of Reed Howe.)

A. He was laying on the pavement at the left side of the front of the truck.

Q. Where was the boy with reference to the center of the pavement,—the center line.

A. At that time, well, I don't recall but I think it is on the accident report.

Q. Mr. Howe, was the boy taken from that place in anybody's car?

A. In the car I was driving at that time for the State.

Q. Who picked the boy up in their arms and put him in the car? A. Mr. Bowman.

Q. In the back of your car was there any blanket or anything?

A. There was a blanket in the back seat of the car.

Q. What was done with the blanket?

A. It was left in there.

Q. Was the boy placed on the blanket or the blanket put around him?

A. At that time I don't remember now, but I remember he was partly on it. I think he was on Mr. Bowman's lap or partly on his lap all the way in to Pocatello.

Q. What was the condition of the boy when you arrived in [54] Pocatello as to whether he was alive or dead?

A. I wouldn't know, I waited for the Doctor for his decision.

Q. Waited until the Doctor saw him?

(Testimony of Reed Howe.)

A. Yes sir.

Q. What did you do then?

A. I took Mr. Bowman and went back to the scene of the accident.

Q. Did you, or had you reported the matter to anyone? A. Yes sir.

Q. To who?

A. To the Bannock county Sheriff's office.

Q. Was anyone there when you got out there on your return to the scene of the accident?

A. Deputy Sheriff Ray Reynolds.

Q. The cars stopped behind the bus, had they gone at that time?

A. I am pretty sure they were, yes sir.

Q. Did you or Mr. Reynolds take any measurements? A. Yes sir.

Q. What did you measure?

A. We determined the point of impact as near as we could and took measurements to where the truck stopped; measurements of the width of the highway and how wide the shoulders were. It was all put on the accident report. It is so long ago I wouldn't remember exactly. [55]

Q. Do you remember how many feet it was from the point of impact to where the truck stopped?

A. I think it was 133 feet.

Q. Do you remember without seeing the accident report how wide the shoulder was on the west of where the truck stopped?

A. It was four or five feet as I remember.

(Testimony of Reed Howe.)

Q. Now, on the east side directly opposite the bus, in the line of traffic that the truck came was there a shoulder there? A. Yes sir.

Q. How wide was that?

A. I cannot remember but it was quite wide as I remember there was no dirt shoulder. There was parking facilities there for that club or something like that.

Q. On the right hand side of the truck going north how many feet was available for traffic, or safe for cars?

A. As near as I remember it was around twenty feet.

Q. Do you know the height of this truck?

A. No.

Q. Do you know the length of it? A. No.

Q. Did you observe any foot prints any place there? A. Yes sir.

Q. What kind were those? [56]

A. Foot prints of the children where they got out of the bus on the shoulder, where they had gotten out of the bus.

Q. Was there any lettering on this bus?

A. Yes sir.

Q. What was that?

A. Sign that said "school bus stop" on the back of the bus, "Independent School District Number one," on the side.

Q. What color was the school bus?

A. Standard school bus, yellowish orange.

(Testimony of Reed Howe.)

Q. What color were the letters? A. Black.

Q. Plainly visible? A. Yes sir.

Q. Did you see, or were you able to see whether or not the lights were blinking?

A. I seen lights on the back of the bus.

Q. Now, did you say anything to Mr. Bowman?

A. Yes sir.

Q. When he first came up? A. Yes sir.

Q. What did you say?

A. I asked if he didn't know he was supposed to stop when he met a school bus.

Q. Did he make a reply?

A. As I remember he said he didn't know. [57]

Q. Was anything said by Mr. Bowman as to the rate of speed he was travelling? A. Yes sir.

Q. What did he say?

A. He said about thirty-five. I asked him how fast he was going and he said about thirty-five miles an hour.

Q. Do you know now or did you afterwards determine whether Gary Checketts was alive or dead?

A. State that again.

Q. Do you know now, or did you afterward,—after the accident determine whether or not Gary Checketts was alive or dead?

A. The only report I had was from the Doctor.

Q. Do you know what kind of truck this was?

A. Yes sir.

Q. What kind was it? A. Federal truck.

Q. What type?

(Testimony of Reed Howe.)

A. Gas delivery truck, I think they rate them at a ton and a half.

Q. One or two of these questions that I have asked you, not having seen the accident report, and it having been more than two years ago, you are not clear on? A. That's right. [58]

Mr. Davis: That is all Mr. Howe.

Cross-Examination

By Mr. Peterson:

Q. When you were talking to Mr. Bowman, did he say that he didn't know or didn't think he had to stop when he was coming in the opposite direction,—isn't that what he said?

A. That was later he said that.

Q. I will ask you if you haven't heretofore testified and if you were asked the question "what did Mr. Bowman say" and if your answer was "I asked if he didn't know he was supposed to stop for a school bus and he replied as I remember he said he didn't think he had to stop when he was coming from the opposite direction?

A. If that is——

Q. ——just a moment, let me ask you if that isn't the testimony you gave in this matter?

A. If it is in that record.

Mr. Davis: What record is that?

Judge Baum: The reporter's transcript.

Q. Where were you when you first noticed that the school bus stopped?

A. There was a group——

(Testimony of Reed Howe.)

Q. How far back were you?

A. There is a curve in the road that I went around, and the [59] road goes into a gradual dip to go up to Meridell Park, I had just come around the curve less than a half that way.

Q. Was the bus in the lower part of the dip?

A. Yes.

Q. The road raises and dips on each side of where the bus was? A. Slightly.

Q. On both sides of where it was?

A. Yes sir.

Q. So you have in this line of traffic with your car stopped immediately back of the school bus,——

A. no,—I was not stopped there, the others were.

Q. What was the first thing you observed as you came around the curve?

A. I noticed the school bus stopped and cars behind it.

Q. What did you see next?

A. Children get out.

Q. Then what did you see?

A. One little boy start across the highway.

Q. Was there a car or cars between you and the bus? A. Yes sir.

Q. How many?

A. I think,—yes, as I recall there was three or four.

Q. What else did you observe?

A. I saw this red truck coming toward the north. [60]

(Testimony of Reed Howe.)

Q. You were driving along the highway when you saw the truck? A. Yes sir.

Q. Where was this red truck when you first saw the bus was stopped, if you know?

A. It was ahead of the bus around a quarter of a mile, yes about a quarter of a mile ahead of the bus.

Q. The children were not out of the bus at that time when you first saw the bus stopped?

A. I saw the bus and truck and the children about the same time.

Q. You looked down saw the bus stopped and the children getting out of the bus and the next thing you saw was the children coming back of the bus? A. Yes sir.

Q. What was the next thing you saw?

A. The truck hit the boy.

Q. Where did the boy ride on the truck when he was hit?

A. The right fender and the bumper.

Q. Where were you when the truck stopped, where were you on the highway?

A. I must have been up the road another fifty yards.

Q. When the truck stopped you were up the road about fifty yards? A. As near as I recall.

Q. You drove up turned around at that time?

A. Yes sir. [61]

Q. You didn't get out? A. No sir.

(Testimony of Reed Howe.)

Q. You drove up behind these cars to a place opposite the truck and turned around.

A. Yes sir.

Q. And you say you didn't get out of the car?

A. Not at that time.

Q. Not at that time. A. No sir.

Q. What happened then Mr. Howe?

A. I stopped.

Q. And what happened?

A. Mr. Bowman got out picked up the boy, I opened the back door and he put the boy on the back seat.

Q. Was there any other man there helping Mr. Bowman? A. Not that I recall.

Q. Was there any other patrolman there?

A. No sir.

Q. Where did Mr. Bowman go when he put the boy in the back seat of your car?

A. He got in with him.

Q. And he rode to the hospital with you?

A. Yes sir.

Q. And after being in the hospital a short while you and Mr. Bowman returned to the scene of the accident? A. Yes sir. [62]

Q. And that is when you saw Mr. Reynolds?

A. Yes sir.

Q. The Deputy Sheriff. A. Yes sir.

Q. And you and Mr. Reynolds made some measurements? A. Yes sir.

Q. When did you see these lights that you were

(Testimony of Reed Howe.)

talking about? A. When I first seen this bus.

Q. They were working then? A. Yes sir.

Q. How many on the back of the bus?

A. There are two on the back but I think I only seen one then.

Q. Was that a blinker light?

A. I don't know.

Q. You know what a blinker light is?

A. Yes sir.

Q. When you drove up there, right after the accident, you didn't see the light then?

A. Repeat that will you?

A. When you drove up the first time did you see the light on at that time?

A. I didn't look at the bus at that time.

Q. When you came back the second time was the light on? A. No. [63]

Q. The blinker light wasn't on? A. No.

Q. They were tried and wouldn't work,—you were there when it was tested? A. Yes sir.

Q. The blinker lights would not work?

A. One would.

Q. Isn't is a fact that when one doesn't work the other doesn't?

A. I am talking about the stop light.

Q. Isn't it a fact that when you came back after being at the hospital the blinker light wouldn't work? A. That's right.

Q. This school bus was never hit by this truck?

A. No sir.

(Testimony of Reed Howe.)

Q. Nothing came in contact with the school bus?

A. No sir.

Q. Did you try these blinker lights in the front when you were back there the second time?

A. I think so, yes.

Q. They wouldn't work in front would they?

A. No.

Q. Mr. Bowman cooperated with you in every way possible didn't he, Mr. Howe?

A. Yes sir, he did. [64]

Mr. Peterson: That's all Mr. Howe.

Redirect Examination

By Mr. Davis:

Q. You had on a uniform at that time?

A. Yes sir.

Q. A regular uniform? A. Yes sir.

Q. This test that you were asked about, about the blinker—the blinker lights, that was made over a half hour afterward, after the bus had completed its run and come back to the scene?

A. Yes, that is as I recall it.

Mr. Davis: That is all.

Mr. Peterson: That's all.

MRS. LAVERN HARDMAN

called by the plaintiffs as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Mrs. Hardman, did you know Gary Checketts during his life time? A. Yes sir.

(Testimony of Mrs. Lavern Hardman.)

Q. On the 24th of February, 1947 what were you engaged in, what was your occupation at that time?

A. I was a school teacher in the Pocatello system. [65]

Q. Was Gary Checketts in your classes?

A. Yes he was.

Q. Do you remember the occasion of him losing his life? A. Yes sir, I do.

Q. Was Gary a healthy active boy?

A. Yes sir.

Q. Was he bright in school?

A. Yes sir, I considered him a good student.

Q. A nicely behaved boy? A. Yes sir.

Q. Did he show good training?

A. Yes sir.

Q. And did you consider him an intelligent, active, normal boy? A. Yes, I did.

Q. Calling your attention to exhibit 1 which has been marked by the Clerk, I will ask you if that is a fair and good likeness of Gary Checketts?

A. Yes, it is.

Q. A fair likeness of him at the time he lost his life? A. Yes sir.

Mr. Davis: We offer in evidence at this time, exhibit 1.

Mr. Peterson: We object to it as entirely immaterial. [66]

The Court: It may be admitted, and you may hand it to the jury.

(Testimony of Mrs. Lavern Hardman.)

Mr. Davis: That is all Mrs. Hardman.

Judge Baum: No questions.

R. J. REYNOLDS

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name is R. J. Reynolds?

A. Yes sir.

Q. Mr. Reynolds, what position did you hold or occupy in Bannock County, Idaho, on the 24th day of February, 1947?

A. Chief Deputy Sheriff.

Q. On that day was an accident reported to you?

A. Yes sir.

Q. I am referring to the time of about four-thirty in that afternoon?

A. Yes sir, there was.

Q. And did you make an investigation?

A. Yes sir.

Q. Did you go to the place of the accident?

A. Yes.

Q. Who reported the matter to you? [67]

A. Reed Howe, the State policeman.

Q. What did you do when you got to the scene of the accident?

A. When I got to the scene of the accident there was a truck setting on the right hand side of the highway facing toward town, that truck was coming in from the south, that was just this side of the

(Testimony of R. J. Reynolds.)
entrance to Meridell Park, and I noticed a blood splotch on the pavement in front of the truck. I walked back toward the entrance to Meridell Park. At that time this school bus driver had returned to the scene with the school bus and Mr. Howe when he reported it to us had reported that he had——

Mr. Peterson: We object to what he was told.

Q. Did Mr. Howe then come back to the scene of the accident? A. Yes sir.

Q. While you were there? A. Yes sir.

Q. And did you and Mr. Howe make any measurements? A. Yes sir.

Q. Did you determine the point of impact between the truck and the boy? A. Yes sir.

Q. How did you do that?

Q. Well, we first examined the highway on the opposite [68] side from where the truck was parked across the street from the entrance to Meridell Park where there were a lot of foot prints on the shoulder of the road. They were children's foot prints, then we measured the bus from the front exit where the children would get off back 26 feet, that was the length of the bus from the exit to the rear; directly across the highway was the heel off a shoe, and that is where we considered the only mark that we could use for a point of impact.

Q. From the point of impact to where the truck stopped did you measure that with a tape line?

A. Yes sir.

Q. How far was that?

(Testimony of R. J. Reynolds.)

A. One hundred and thirty-three feet.

Q. That was from the point of impact to where the truck stopped? A. Yes sir.

Q. Who assisted you in measuring that?

A. Mr. Howe.

Q. Did you take a picture of the truck involved in this accident? A. Yes sir.

Mr. Davis: I will have this marked as plaintiff's exhibit 2.

Judge Baum: When was that taken?

A. That same afternoon. [69]

Judge Baum: By you? A. Yes sir.

Q. Is that a fair likeness of that truck?

A. Yes sir.

Q. I call your attention to what would be the right hand side of the truck—no I withdraw that question and consent that it be stricken.

Q. Did you examine the truck personally?

A. Yes sir.

Q. Did you see any dents or marks or place*d what* it had struck anything or anything had struck it?

A. Yes sir, the right front fender had a dent in it.

Q. The right front fender?

A. Yes sir, and the headlight was bent.

Q. On the right side? A. Yes sir.

Mr. Davis: We offer this exhibit in evidence.

Judge Baum: No objection.

(Testimony of R. J. Reynolds.)

The Court: It may be admitted and you may show it to the jury.

Q. Mr. Reynolds how far from where you determined the point of impact to be was it to where you saw this blood spot?

A. The blood spot was after the truck had stopped, it was on the pavement in front of the truck. When I first got to the scene of the accident the truck was there [70] by itself.

Q. The truck was standing there when you got there? A. Yes sir.

Q. And the blood spot was where with reference to the truck? A. In front of it.

Q. Where was the truck on the pavement line of traffic?

A. On the right hand side as you come to town, on the edge of the pavement.

Q. On the east edge? A. Yes sir.

Q. Who moved the truck from there?

A. I think the driver did.

Q. Did you at any time observe this school bus as to what lettering was on it?

A. I have seen a number of them but I don't know.

Q. What color was the school bus?

A. Yellow.

Q. Do you know yourself whether it had any lettering that said "stop" printed on it?

A. I don't recall.

Q. Did you take any measurement as to the

(Testimony of R. J. Reynolds.)

height of it? A. The height of the bus?

Q. Yes? A. No, I didn't.

Q. Do you know its seating capacity?

A. I don't know. [71]

Q. What was the overall length?

A. It was about 32 feet.

Q. Twenty-six feet from the door to the back of it? A. Yes sir.

Mr. Davis: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. When you got out to the scene of the accident the school bus wasn't there? A. No sir.

Q. So you don't know other than what you observed on the ground, where the school bus stopped and the children got out? A. No.

Q. You don't know when this dent was made on the fender of the truck of your own knowledge?

A. No.

Mr. Peterson: That is all.

Mr. Davis: That's all.

ALMA MARLEY

called as a witness by the paintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis: [73]

Q. You are the Sheriff of Bannock county, Idaho? A. Yes sir.

(Testimony of Alma Marley.)

Q. And you were Sheriff of this county on the 24th day of February, 1947? A. Yes sir.

Q. At that time Sheriff, were you familiar with the road and highway at Meridell Park and on either side of it? A. Yes sir.

Q. Subsequent to that time did you make any observation or measurement on the highway at that point, at the highway near Meridell Park?

A. Yes sir.

Q. What were those measurements made for?

A. For the purpose of learning how far a driver coming from the south could see a school bus at the place this school bus was stopped?

Q. Was the measurement made from a school bus that stopped at Meridell Park?

A. Yes sir.

Q. You drove south from there?

A. Yes sir.

Q. How far from that point was the school bus plainly visible?

Judge Baum: That is objected to as incompetent, irrelevant and immaterial, it has not been shown here that the visibility was the same as at the time of the accident. [74]

The Court: He may answer, it has been testified that the weather was clear on the day of the accident. It can be shown here now if the weather was clear when the measurement was made.

A. Six-tenths of a mile.

Q. Were you in a conveyance of some sort?

(Testimony of Alma Marley.)

A. Yes sir.

Q. What were you in?

A. A DeSoto sedan.

Q. What was the condition of the weather?

A. It was clear.

Q. When you made this measurement?

A. Yes sir.

Q. Did you stop your car at the distance you could see? A. Yes sir.

Q. Did the school bus stop opposite Meridell Park? A. Yes sir.

Q. Could you see it plainly from a distance of six-tenths of a mile? A. Yes sir.

Q. Was there anything in the road at that time to obstruct one's vision? A. No sir.

Q. I hadn't finished my question.

A. Pardon me.

Q. Was there anything in the road at that time to obstruct [75] one's vision in coming from the south and going north from the point you stopped to Meridell Park that day? A. Nothing.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Peterson:

Q. All you know is that someone told you the point where the school bus stopped and you measured it?

A. They told me that is where the school bus stopped?

Q. When was it?

(Testimony of Alma Marley.)

A. I don't recall how long after the accident.

Q. About how long?

A. I think it might have been two or three months.

Q. What was done?

A. The driver of the school bus drove it over there—he drove out there and stopped and I drove south and came back until I could see the bus?

A. That is all you know?

The Court: That is not quite fair to ask the Sheriff that question, he has testified as to what happened.

Q. All you know is what they told you about where the bus stopped?

A. That is all I know about that.

Mr. Peterson: That's all. [76]

Redirect Examination

By Mr. Davis:

Q. Was the man driving the bus the day you inspected it and made these measurements the same man who drove it at the time of the accident?

A. No sir.

Q. Then there didn't anybody tell you about the bus stopping at the place at the time you saw it stopped, you saw that yourself.

A. Yes sir, I saw it stopped there.

Mr. Davis: That's all Sheriff.

Mr. Peterson: That is all.

R. M. PUGMIRE

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name is R. M. Pugmire?

A. Yes sir.

Q. What is your occupation?

A. Police Officer.

Q. How long have you been a police officer?

A. Roughly about thirty years?

Q. In Bannock County?

A. Yes sir. [77]

Q. At one time did you act as State patrol officer.

A. No sir.

Q. Have you ever acted as patrol officer or motor cycle officer? A. Yes sir.

Q. Have you had other training in that line?

A. Yes sir.

Q. Where was that? A. With the F.B.I.

Q. How long was that?

A. About three years.

Q. You have had—strike that—have you had any experience with automobiles or motor vehicles and speeds of the same? A. I have.

Q. And over what period of time?

A. Off and on during the entire time I have been a police officer.

Q. Have you made investigation and studies as

(Testimony of R. M. Pugmire.)
to the distances within which motor vehicles can be stopped at certain rates of speed?

A. Yes, I have.

Q. I will ask you Mr. Pugmire, assuming that the pavement in the vicinity of Meridell Park is dry and that a motor vehicle—what has been described as a one and a half ton truck with the brakes in good condition [78] on that highway can you tell how long or what distance would it take that truck to stop if it were traveling at a rate of fifty miles an hour?

Judge Baum: We object to that as no proper foundation has been laid, and not all of the circumstances have been detailed upon which it is necessary to base an opinion or answer.

Mr. Davis: Maybe that I didn't ask Mr. Bowman the condition of the brakes on the truck at the time I have him on the stand, if I didn't I will ask to have this witness leave the stand for the present and call Mr. Bowman again.

The Court: You may do that.

RALPH L. BOWMAN

recalled as a witness by the plaintiff, testifies as follows, having heretofore been sworn.

Direct Examination

By Mr. Davis:

Q. Mr. Bowman, on the 24th day of February, 1947, the truck you were driving, did it have four

(Testimony of Ralph L. Bowman.)

wheel brakes? A. Yes sir.

Q. Were they in good condition?

A. Yes sir.

Q. Was it known as a ton and a half truck?

A. Yes sir.

Q. Federal truck? [79] A. Yes sir.

Q. Near Meridell Park where the accident happened, that was a paved highway?

A. Yes sir.

Q. The pavement was dry? A. Yes sir.

Mr. Davis: That's all of this witness.

Judge Baum: No questions.

R. M. PUGMIRE (Recalled)

Direct Examination

By Mr. Davis:

Q. Mr. Pugmire, assuming that on the 24th day of February, 1947, near Meridell Park on a dry paved road, with a Federal one and a half ton truck with four wheel brakes, in good condition, at what distance could the truck be stopped while traveling at fifty miles an hour, upon application of the brakes?

Mr. Peterson: May I ask a question, looking to an objection?

The Court: Yes, you may.

By Mr. Peterson:

Q. The answer you have in mind is based upon actual tests you have conducted Mr. Pugmire?

A. No sir. [80]

Q. Actual tests that you have seen conducted?

(Testimony of R. M. Pugmire.)

A. Yes sir.

Q. Have you observed the conducting of the tests yourself? A. Some of them.

Q. Is it based wholly or in part on any chart or record that you may have read?

A. Partly.

Mr. Peterson: Now, Your Honor, we submit that the evidence upon which he predicates or intends to predicate his answer is hearsay if it is based upon charts or records?

Q. (By Mr. Davis): Did you observe this kind of truck with this kind of tires under these circumstances?

A. I am not familiar with the type of tires. I have made tests with trucks similar to this truck?

Q. You conducted those tests yourself?

A. Yes sir.

Q. When were those conducted?

A. They are not numerous and spread over a number of years that particular type of truck.

Q. Did you make any written memorandum of those tests? A. Yes, we have records.

Q. (By Mr. Peterson): Are you testifying from records you made of those tests you took yourself? A. No. [81]

Mr. Peterson: We submit that the witness is not qualified to draw a conclusion.

The Court: He may answer.

A. At that particular speed of fifty miles an hour if the roadway and the brakes on the truck were in top shape if the road was dry and the

(Testimony of R. M. Pugmire.)

brakes were applied forcibly the driver should stop the car in two hundred and eight feet.

Q. At what distance could the truck be stopped at a speed of forty-five miles an hour under the same conditions?

A. I am going to have to refer to the chart.

Mr. Peterson: We object to that; we don't know the reliability of the chart nor its origin.

The Court: Objection sustained.

Q. Mr. Pugmire, what do you have reference to?

A. I have a chart adopted by the associations as a uniform traffic control for traffic regulations, it is approved by and is a standard for the American Standards Association, and adopted by the AAA and police officers generally in computing these figures.

Q. As I understand it now, you are basing your testimony on your own actual experience and tests and on your study of this particular publication, what you are talking about is in this standard publication? A. That is correct.

Q. It is easier to look at that to see that your answer is [82] correct than to compute it?

A. That's right.

Q. You could examine the chart and then come back and testify could you?

A. Yes sir. Now, at what speed again, did you say.

Q. I will ask you what would be the normal stopping distance of the truck under those condi-

(Testimony of R. M. Pugmire.)

tions I mentioned going at a speed of forty-five miles and hour, and if you need to refresh your recollection do so.

Mr. Peterson: We object to that as incompetent.

The Court: He may answer.

A. One hundred sixty-eight feet.

Q. And at a speed of forty miles an hour under the same conditions?

A. One hundred thirty-seven feet.

Q. And at thirty-five miles and hour?

A. One hundred nine feet.

Mr. Davis: That is all.

Cross-Examination

By Mr. Peterson:

Q. Does it make any difference if the truck is loaded or empty?

A. It should not make any difference.

Q. You say it does not make any difference whether it is loaded or empty?

A. It is the practical stopping distance under all conditions [83] providing the truck is in tip-top shape so far as brakes and tires are concerned.

Q. Does it make any difference if the truck is loaded?

A. This is the practical stopping distance under those conditions I mentioned.

Q. It is your opinion that it would not make any difference whether it was loaded with a ton and half of material or whether it carried none?

(Testimony of R. M. Pugmire.)

A. Yes it would. We could stop it short of that distance.

Q. Does it make any difference whether it is loaded or empty? A. Yes sir, I think so.

Q. You have changed your testimony?

A. No sir.

Q. What difference does it make if it is loaded or empty?

A. It could be stopped short of that distance.

Q. If it was loaded?

A. No, empty.

Q. Does it make any difference as to the type of tires the truck has? A. Yes sir.

Q. And does it make any difference whether the tires are fully inflated or partly? A. Yes sir.

Q. Does it make any difference whether the road is down or [84] up hill? A. Yes sir.

Q. And does it make any difference whether the surface is smooth or concrete or corrugated?

A. Yes sir.

Q. (By Mr. Peterson): We move to strike the answers of this witness as to the matter upon the ground that there are innumerable important considerations not considered by the witness in this case.

The Court: The motion will be denied.

Mr. Peterson: That is all.

Mr. Davis: No other questions.

NORELL CHECKETTS

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name is Norell Checketts?

A. Yes sir.

Q. And you are one of the plaintiffs in this case?

A. Yes sir.

A. This is your wife that sits here?

A. Yes sir.

Q. And this is your son Doyle? (Indicating.)

A. Yes sir. [85]

Q. Where did you live on the 27th—excuse me the 24th of February, 1947?

A. Meridell Park, south of Pocatello.

Q. Do you know the width—withdraw that—was it customary of you and Mrs. Checketts to send your son Gary to school in Pocatello?

A. Yes sir.

Q. How did he come to school?

A. By bus.

Q. School bus? A. Yes sir.

Q. And how long had you been living at that place?

A. About three or four months.

Q. What was your occupation?

A. Clerk-inspector for the Pacific Fruit Express.

Q. How long had you lived in Pocatello—no, I

(Testimony of Norell Checketts.)

will ask this; how long did you live here after this accident?

A. To the following April after the accident.

Q. What are you engaged in now?

A. I am herdsman for Stanley and Farnes?

Q. And what do you mean by that?

A. I have charge of the dairy cattle.

Q. Where did you live before you came to Pocatello? A. Grace.

Q. Do you have relatives at Grace?

A. No sir. [86]

Q. Do you have any relatives at Preston, Mr. Checketts?

Judge Baum: We object to that as incompetent, irrelevant and immaterial, we see no purpose in this.

Mr. Davis: Withdraw it.

Q. Do you know the width of the bus your son rode back and forth to school?

A. Seven and a half feet.

Q. And do you know the height of it?

A. Nine and a half feet.

Q. And the length?

A. Thirty-two feet.

Q. Do you know the capacity of it?

A. No.

Q. Do you know what lettering was on it?

A. On the back it had "stop" "school bus" in large letters.

Q. On the side was anything written?

(Testimony of Norell Checketts.)

A. Yes, "Independent School District Number One."

Q. What kind of letters were those?

A. A little smaller than those on the back?

Q. What color were the letters?

A. Black.

Q. What color was the bus?

A. Orange.

Q. Was it plainly marked "Independent School District Number One."?

A. Yes sir. [87]

Q. Where do your father and mother live?

A. Just out of Preston, Idaho.

Q. What was your—did you have any understanding as to whether or not you were obliged to send your son to school?

Judge Baum: Objected to as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: I think it is well known that it was his duty to send his child to school however he may answer.

A. Yes sir.

Q. When did you first know that anything had happened to Gary?

A. When they called me at the office.

Q. How old was Gary?

A. Lacked three months of being nine.

Q. What was the condition of his health?

A. Good.

(Testimony of Norell Checketts.)

Q. What was Gary's nature as to whether he was affectionate, was he an affectionate boy?

A. Very much.

Q. Did you love your boy?

A. Yes sir.

Q. Did he return that affection?

A. Yes sir. [88]

Q. Do you miss his comfort and companionship?

A. Yes sir.

Judge Baum: Objected to as being suggestive and leading.

The Court: It has been answered and the answer may stand.

Q. What were the boy's characteristics as to whether or not he wanted to assist and help his parents? A. He was very good.

Q. Did you—taking into consideration the boy's general characteristics and affection did you expect that he would assist you and help you as you needed his help from time to time?

A. Yes sir.

Q. Did you expect that he would be of comfort and assistance to you after you became older and after he became of age? A. Yes sir.

Q. Did you expect that you would be able to use that boy's assistance and that he would give you valuable help up until he became of age, twenty-one years? A. Yes sir.

Q. What is the fact with reference to whether he was an energetic boy?

(Testimony of Norell Checketts.)

A. He was very much that way.

Q. What is the fact as to whether he liked to work? [89] A. Yes sir.

Q. What is the fact as to his school work?

A. He was very good in school.

Q. Do you know what the amount of the charge against you for funeral charges for Gary was?

A. Around four hundred dollars.

Q. Do you know what the total expenses, the total expense with reference to it was?

A. No, I cannot say.

Q. Handing you exhibit one is that a fair likeness or a good representation of Gary?

A. Yes sir.

Q. As I understand you, you don't want to compute and you don't know what the other expenses are except this four hundred dollars?

A. Yes sir, that is right.

The Court: We will recess at this time for fifteen minutes.

3:50 P.M., June 2, 1949

Mr. Davis: I spoke to counsel in chambers. I suppose counsel will stipulate that this boy met his death in this accident?

Judge Baum: That is correct.

The Court: Then may it be understood that no proof of the actual death need be put in. [90]

Mr. Davis: That is right.

Judge Baum: That is right Your Honor.

The Court: It is so understood, ladies and gen-

(Testimony of Norell Checketts.)

tlemen of the jury, it has been stipulated by counsel that it is not necessary to place any proof in this case touching the death of the boy, it is agreed that he met his death in this accident.

Q. Now, Mr. Checketts do you know of the amount of the statement for Gary's funeral services? A. $407.50.

Q. Do you know what the statement was from the doctor who examined Gary at the hospital?

A. No, I haven't my receipts with me.

Q. You haven't any of the other statements with you? A. No.

Q. (By Mr. Davis): Not having the statements and having set out that item as $950.00 we at this time waive the difference between $407.50 and $950.00, which of course, would be to the advantage of the defendant.

The Court: I imagine there is no objection to that.

Judge Baum: We have no objection.

Mr. Davis: That is all of this witness.

Judge Baum: No cross.

MRS. TWILA CHECKETTS

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. You are or were the mother of Gary Check-

(Testimony of Mrs. Twila Checketts.)

etts? A. That's right.

Q. This is your husband (indicating)?

A. Yes sir.

Q. Doyle, here, (indicating) is your son?

A. Yes sir.

Q. Was Doyle going to school and was he on the bus at the time the accident happened?

A. Yes, he was.

Q. At the time Gary was killed?

A. Yes sir, he was.

Q. You heard Mr. Checketts—withdraw that—How old was Gary, Mrs. Checketts?

A. He lacked three months of being nine years old.

Q. What was his health?

A. Very good.

Q. What is the fact as to whether he was industrious?

A. He was very much so for a child of his age.

Q. What is the fact as to how he did in school?

A. He was very good in school.

Q. What is the fact as to whether he showed any affection for you? [92]

A. Very much so, yes.

Q. Did he help you?

A. He was awfully good to help in the house for a little boy.

Q. What is the fact as to whether or not he was obedient and would mind well?

A. He always minded very well.

(Testimony of Mrs. Twila Checketts.)

Q. Did you love Gary?

A. Yes sir.

Q. Did Gary return that love and affection.

A. Very much so.

Q. Have you missed his love and affection and do you miss it now? A. Yes sir.

Q. Do you miss his companionship?

A. Yes sir.

Q. What did you believe or expect from his characteristics or attitude as to whether he would be a comfort to you, and a companion as you grew older? A. I know he would have been.

Q. What do you think as to whether he would help you and your husband if you needed help?

A. He would have helped.

Q. As he grew older and you grew older, after he attained the age of twenty-one, what do you think as to whether he would have worked for his father and you? A. Yes he would. [92-A]

Q. What was his characteristics as to whether he liked to stay with his mother?

A. He was very affectionate, he was always very good to me and very affectionate with me.

Q. Where were you at the time of the unfortunate accident? A. At home.

Q. You did not see Gary at that time?

A. No.

Q. It was sometime later?

A. It wasn't until the next day.

Q. Did you have any other children?

(Testimony of Mrs. Twila Checketts.)

A. I had Doyle age seven and a baby three weeks old.

Q. How old was the baby did you say?

A. Three weeks.

Q. Mrs. Checketts, I show you this exhibit 1, and ask you if that is a good likeness and fair representation of Gary at the time you last saw him?

A. Yes sir, it is.

Mr. Davis: That's all, you may examine.

Judge Baum: No questions.

Mr. Davis: We rest at this time.

The Court: We will recess at this time for fifteen minutes.

3:35 P.M., June 2, 1949

ROBERT R. SMITH

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. Your name is Robert Smith.

A. Robert R. Smith.

Q. How old are you?

A. Twenty-four.

Q. You live where?

A. 809 South 10th.

Q. In Pocatello? A. Yes sir.

Q. In February, 1947, where were you living?

A. 754 North Arther.

Q. Here in Pocatello? A. Yes sir.

(Testimony of Robert R. Smith.)

Q. Were you a student at that time in any school?

A. The Southern Branch, now Idaho State College.

Q. What type of work were you doing in addition to that of being a student?

A. Bus driver.

Q. By whom were you employed?

A. Independent School District Number One.

Q. Were you driving a bus on the 24th of February, 1947? A. Yes sir. [94]

Q. What type of bus was that?

A. About sixty passenger, school bus.

Q. Do you know its approximate length?

A. About thirty-three feet long.

Q. Did it have a number?

A. Yes sir, bus number two.

Q. Is that the bus that Gary Checketts was riding in? A. Yes sir.

Q. Do you recall what time you left your first station that afternoon?

A. The first station about four o'clock.

Q. Where did you go?

A. The first station would be the high school, then to the Franklin Junior High and then to Whittier.

Q. Where did you pick up Gary Checketts?

A. Whittier.

Q. Where is that?

A. South Fourth about the 900 block.

(Testimony of Robert R. Smith.)

Q. Where did you drive them?

A. Down second toward Ross Park until I came to the cut-off to the highway, and I turned and drove to the highway.

Q. Where is that? A. At Weller's.

Q. That is called Wellerville?

A. Yes sir. [95]

Q. And when you reached the highway which way did you go?

A. Turned right on the highway and went south.

Q. South at that point? A. Yes sir.

Q. Do you recall when you approached Meridell Park or the Owl Club?

A. Approximately four-thirty.

Q. What is the terrain there, is it a level road?

A. It dips a little, the Owl Club is in a sort of dip about in the center of the dip. There is a slight rise on each side.

Q. What did you do at the Owl Club?

A. I started to stop there, I have students that get off there.

Q. Where did you stop?

A. Right at the Owl Club?

Q. Did you stop in the highway?

A. Yes sir.

Q. In your line of traffic? A. Yes sir.

Q. Did some children get off? A. Yes sir.

D. Did this bus have a signal arm on it?

A. No.

Q. No arm? [96]

A. No arm.

(Testimony of Robert R. Smith.)

Q. What sort of lights were on it?

A. Clearance lights on front and two large amber lights on the rear that have stop written on them.

Q. Are they blinker lights? A. Yes sir.

Q. Were they working that day?

A. No sir.

Q. After this accident did you make a test of the lights? A. Yes sir.

Q. Were they working? A. No.

Q. The blinker lights in front were not working? A. No sir.

Q. That was a regular stop was it?

A. Yes sir.

Q. You stopped in your line of traffic?

A. Yes sir.

Q. Do you know how wide the highway—the surface of the highway is at that point?

A. Not exactly?

Q. What is your best judgment?

A. About fourteen feet.

Q. To the west of that point was there a borrow pit, and graveled surface?

A. Short graveled surface and a deep borrow pit. [97]

Q. To the east.

A. The road leading into Meridell Park and there is a clearing in front of the Owl Club.

Q. A wide sort of flange there in the highway?

A. Yes sir.

(Testimony of Robert R. Smith.)

Q. Extending how far up and down the highway? A. Fifty feet.

Q. Do you know how wide it is?

A. Twenty to twenty-five feet.

Q. You didn't turn over in that space to unload?

A. No sir.

Q. As you drove up and stopped, relate to the jury what you saw or observed, give them the entire story?

A. I had four children that was supposed to get off, and I stopped the bus and opened the door.

Q. Where is this door?

A. Toward the front of the bus opposite the driver's seat.

Q. On the right side? That's right.

Q. Go ahead?

A. I opened the door and the children started to get off. I was watching the children, I looked up the highway and saw this truck—I didn't give it much thought, I looked back at the children getting off, sometime there I looked into the rear mirror—the rear view mirror [98] I noticed some cars stopped behind the bus; the children had just about finished getting off and I noticed this truck wasn't going to stop; this high-school student that rode the bus, I told him——

Mr. Davis: We object to this unless——

Judge Baum: ——Did you give the children or the child warning?

A. No, not the child.

(Testimony of Robert R. Smith.)

Q. Did you give this high-school boy warning?

Mr. Davis: Now, I object to anything that was said to anyone unless the warning was to Gary Checketts.

The Court: That is right, sustained.

Judge Baum: This is preliminary.

The Court: Objection sustained.

Q. When you first noticed this truck where was it, I am thinking about the truck that you said you noticed, which way was it coming from?

A. From the south.

Q. From the south?

A. Yes, it was headed toward town.

Q. How far was it from where you were in the bus when you first saw it?

A. When I first noticed it, it was about a block or a block and a half in front of the bus.

Q. As to its rate of speed, what have you to say? [99]

A. I was looking around, one place an another, and I wasn't paying too much attention to the rate of speed; I know he wasn't going at a terrific rate of speed, about average I would say.

Q. At the time you first noticed him were any of the children off the bus?

A. As I recall I had opened the door and they started to getting out when I first noticed it.

Q. Do you know which one got off first?

A. Gary got off first.

(Testimony of Robert R. Smith.)

Q. The relative ages or sizes of the other children?

A. They must have been—well, the two youngest must have been first or second graders, six or seven and then there was one high school student.

Q. Then Gary and then the high school student?

A. Yes sir.

Q. He was the last one off? A. Yes sir.

Q. As you looked back the next time where was this truck?

A. As the high school student was getting off.

Q. I don't know who was getting, but when you looked back the next time.

A. The truck was still approaching and I noticed that he wasn't going to stop.

Q. How far was he from you? [100]

A. Pretty close.

Q. How fast was he driving?

A. About the same.

Q. About the same as he had been?

A. Yes sir.

Q. Then what happened?

A. As I saw that he wasn't going to stop I told the high school boy——

Q. ——No, not that.

A. Well the little boy got off and ran toward the back of the bus and I looked up and the truck was still coming and I looked into the rear view mirror and I saw the little boy's head on the side of the

(Testimony of Robert R. Smith.)

road and the truck pulled on up and stopped.

Q. Did you get out of the bus?

A. Yes sir.

Q. Where did you go?

A. I ran around the bus and across the highway toward the truck.

Q. What did you observe?

A. The truck driver had jumped out of the truck; he yelled to tell me——

Mr. Davis: We object to that.

The Court: Just what happened there.

A. The truck driver jumped out and he told me to turn a car around and go to the hospital, just then the State [101] police officer came toward us and he had turned around—he saw what happened I presume. He laid the boy in the seat of the police car and took off.

Q. How far was this truck—strike that. You referred to Mr. Bowman when you mentioned the driver of the truck? A. Yes sir.

Q. How far was this truck from your bus as you ran up?

A. Must have been about sixty feet from the back of the bus to the back of the truck.

Q. Where was Gary Checketts laying when you got up there?

A. In front of the truck.

Q. How far from the front of the truck?

A. He was right in front as I remember.

(Testimony of Robert R. Smith.)

Q. Where was the truck in reference to its line of traffic?

A. Still in that line of traffic, might have had one wheel in the gravel.

Q. State where Gary Checketts was in reference to the front of that truck?

A. In the right hand line of traffic in front of the truck.

Q. Where was Mr. Bowman?

A. He was picking up the boy as I remember or had picked him up.

Q. The patrolman came and Mr. Bowman and the boy, Gary Checketts and the patrolman left?

A. Yes sir. [102]

Q. How long did you stay?

A. Just a few minutes.

Q. Then you drove on? A. Yes sir.

Judge Baum: That is all, you may inquire.

Cross-Examination

By Mr. Davis:

Q. Mr. Smith, this test that was made of the lights; that was made after you had completed your run and come back in front of the Owl Club?

A. Yes sir.

Q. When you are inside of the bus can you tell whether the lights are blinking or not?

A. No sir.

Q. And you didn't mean to say that you knew that the lights were not blinking at the time you let Gary Checketts off? A. No sir.

(Testimony of Robert R. Smith.)

Q. Was there any kind of signal on the front of the bus that you give when turning?

A. Yes sir, directional signals on the fenders, front and back that indicate the direction you are turning.

Q. Is there one on there? A. Yes sir.

Q. And was on there that day? [103]

A. Yes sir.

Q. You could work it that day?

A. Yes sir.

Q. You think the road was about fourteen feet wide at that point?

A. Yes sir, approximately.

Q. You say this man was coming at a terrific speed? A. No sir.

Q. I meant to say that you said he wasn't coming at a terrific rate of speed?

A. No sir, he wasn't.

Q. What do you mean by a terrific speed.

A. Some drivers go by pretty fast.

Q. Do you mean seventy or eighty miles an hour? A. Sixty or seventy.

Q. What do you call normal speed, forty or fifty.

A. About forty.

Q. You didn't notice any difference in this man's rate of speed from the time you first saw him until he passed your bus? A. No.

Q. Did you hear him honk his horn?

A. No.

(Testimony of Robert R. Smith.)

Q. Did you hear his brakes screech or howl?

A. Not that I remember.

Q. He was a block or a block and a half away when you first [104] saw him? A. Yes.

Q. Do you mean three hundred feet, by a block?

A. Is that about a normal city block?

Q. That is what I think?

A. And that is what I had in mind.

Q. He was three to three hundred fifty, no, three hundred to four hundred fifty feet away when you saw him first? A. Yes sir.

Q. And your children were getting off the bus then? A. Yes sir.

Q. He didn't slow down?

A. Not that I know of.

Mr. Davis: That is all.

Redirect Examination

By Judge Baum:

Q. You had trouble with those blinker lights for some time? A. Yes sir.

Q. This arm was something in the rear of the bus you used when you were turning?

A. Yes sir, the rear and the front, but it wasn't an arm.

Q. It was no arm?

A. No sir, on the light.

Q. It was just on the light? A. Yes sir.

Q. Was there any arm on the front or the back of that bus? [105] A. No sir.

Q. Did you blow your horn at that time?

A. No sir.

(Testimony of Robert R. Smith.)

Judge Baum: That is all.

Recross-Examination

By Mr. Davis:

Q. I am going to ask you with reference to the question that was asked you and the answer that you made at the time you gave testimony before, would you like to have this handed to you before I ask it so that you can see it?

A. It doesn't matter.

Q. I asked you about this, and this is what I had reference to; is that on some buses they have a long arm and the driver gives his warning, I think that was the question, and I asked, do you have that on this particular bus and you answered no, we have a signal directional arm used to signal directions, turning right or left, we have a signal direction, or rather, it covers every direction and stop, did you make such an answer.

A. Well, the little directional signal don't have anything to do with the stopping. They are about three inches in diameter, the lights and they have a little arrow inside and it works on a lever inside, you flip it up or down to indicate which way you are going to turn, it has nothing to do with stopping. [106]

Q. If it covers every direction or stop—did you mean the direction signal or the stop signal?

A. The directional light covers every direction, when we turn left or right.

Q. How is that painted.

(Testimony of Robert R. Smith.)

A. Black normally and about three inches in length.

Q. Does it throw out from the bus?

A. No it is stationary.

Q. And where does it set on the bus?

A. On either fender in front, in the middle of the fender.

Q. When you stop do you, or does the bus show it as stopped with this signal?

A. Those have nothing to do with this signal arm, all they indicate is which way the bus is turning. The light goes on left when I turn left and it goes on right when I turn right.

Q. What did you mean when you answered that it covers every direction or stop?

A. I don't know. It hasn't anything to do with stopping.

Q. When you stop the school bus you put on the brake? A. Yes sir.

Q. Does that turn on any light except the blinker? A. Just the blinker.

Q. Are there lights on the back of the bus besides the blinker lights?

A. Yes sir, the tail light and the clearance light and the [107] directional signal light.

Q. What about the tail light, when you put on the brake does it turn that on?

A. No sir, just when the lights are on.

Q. And it was broad daylight at that time.

A. Yes sir.

(Testimony of Robert R. Smith.)

Mr. Davis: That is all.

Judge Baum: That is all.

FRED W. GOODSON

called by the defendant as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. Your name is Fred W. Goodson?

A. Yes sir.

Q. You are employed by whom?

A. Bullock Motor Company.

Q. Were you living in Pocatello on February 24, 1947? A. Yes sir.

Q. Who were you working for at that time?

A. Independent School District Number One, Pocatello.

Q. In what capacity?

A. School bus foreman.

Q. Were you acquainted with school bus number two? A. Yes sir. [108]

Q. You are acquainted with Mr. Smith, who just left the witness stand?

A. Yes sir.

Q. Was he one of the bus drivers at that time?

A. Yes sir.

Q. Did you on the evening of the 24th of February inspect that bus? A. Yes sir.

Q. Where was that inspection made?

A. The first was at—across from the scene of

(Testimony of Fred W. Goodson.)
the accident.

Q. Where was—strike that—what time was that?

A. About five or five-thirty that evening.

Q. Will you state to the Court and jury with reference to the lights on the front of that bus?

A. Well, the bus is set up with the normal headlights, a clearance light on each side, on the roof of the bus in the middle is a cluster of three; on each fender is a circular shaped light which is baked enamel with a light in it to use as a directional signal; on top is two stop lights with motor lights and with the word "stop" printed on the light.

Q. Are they known as blinker lights?

A. Yes sir.

Q. These directional lights are only on when the lights are on Mr. Goodson?

A. The only time they are on is when the driver indicates [109] with a handle the direction he is going.

Q. If he doesn't flip the handle they don't go on? A. No sir.

Q. Those directional lights work from what?

A. From a handle on the steering wheel.

Q. That must be worked to make them light?

A. That is worked manually.

Q. And it must be worked to make the directional lights go on? A. Yes sir.

(Testimony of Fred W. Goodson.)

Q. The clearance lights are they independent or are they on all of the time?

A. They are on a switch.

Q. You mean that they are not on in the daytime. A. No sir, they are not.

Q. The blinker lights work from what source?

A. The driver applies his brakes, causes a circuit and that works an electric motor that causes the flashing or blinking effect of the light; they have to work entirely from the brake.

Q. What time of the day did you inspect that bus? A. Between five and five-thirty.

Q. In the evening? A. Yes sir.

Q. The day of the accident? A. Yes sir.

Q. Were the blinker lights working?[110]

A. At that time they were not.

Q. Had you had trouble with the blinker lights on that bus at any time? A. Yes, we had.

Q. Was there an arm on the bus that swings out? A. Not at the time of the accident.

Q. They put one on afterward?

A. Yes, sir.

Judge Baum: You may examine.

Cross-Examination

By Mr. Davis:

Q. It was put on at a time afterward when the State law was changed? A. Yes, sir.

Q. To comply with another State law that was adopted? A. That is the way I recall.

(Testimony of Fred W. Goodson.)

Q. There wasn't any law with reference to it at that time? A. Not that I know of.

Q. Mr. Goodson, the fact is, is it not that when the motor that operated these blinker lights was not and the brakes were applied the blinker lights work, that is what you found out?

A. Yes, sir.

Q. And you testified at the Coroner's inquest did you not? A. Yes sir.

Q. Do you recall making this statement: "and if the lights [111] on the back of the bus worked the front ones had to be at the time of the accident, there is no getting around it"?

A. Are you speaking of the blinker lights?

Q. Yes. A. Yes sir, I did.

Q. Now, if people saw the blinker lights working on the back of the bus at the time of this accident; if the blinker light worked on the back of the bus at the time of the accident, they had to work on the front? A. Yes sir.

Q. They were in a series? A. Yes sir.

Q. And couldn't help but both work if one worked? A. That's right.

Mr. Davis: That is all.

Redirect Examination

By Judge Baum:

Q. You checked the lights the next morning?

A. That's right.

Q. And they didn't go on? A. No sir.

Q. That is the front and back blinker light?

(Testimony of Fred W. Goodson.)

A. Yes sir.

Judge Baum: That is all, thank you.

Recross Examination

By Mr. Davis: [112]

Q. The test was the next day? A. Yes sir.

Q. And you didn't mean to change your previous answer that if the blinker lights were working or blinking on the back of the bus they had to be blinking on the front?

A. Yes sir, if one was working they all had to be working.

Mr. Davis: That is all.

Judge Baum: That is all.

RALPH L. BOWMAN

called as a witness by the defendants, after heretofore being sworn testifies as follows:

Direct Examination

By Mr. Peterseon:

Q. You are the truck driver referred to here?

A. Yes sir.

Q. And your name is what?

A. Ralph L. Bowman.

Q. Where do you live?

A. 907 North Ninth.

Q. You are a married man? A. Yes sir.

Q. You have a wife and children?

A. Yes sir.

Q. How many children? A. Two.

Q. What were you doing on the 24th day of

(Testimony of Ralph L. Bowman.)

February 1947? A. I was delivering gasoline.

Q. For whom were you working?

A. Covey Gas and Oil Company.

Q. Had you made a trip out of town that day?

A. Yes sir.

Q. Where to? A. McCammon?

A. What type of truck were you driving?

A. Ton and a half Federal Delivery truck?

Q. That is not known as a tanker?

A. No sir.

Q. Just one truck and not a trailer?

A. No sir, no trailer.

Q. Your children's ages, Mr. Bowman?

A. Two and six.

Q. What time—withdraw that—what were you taking to McCammon, Idaho? A. Gasoline.

Q. Did you unload it? A. Yes sir.

Q. Coming back do you recall coming over a hill in the Meridell Country? A. Yes sir.

Q. How fast were you driving—withdraw that—coming into the area known as the Meridell area, are you [114] coming up or going down hill?

A. Coming up.

Q. That is coming out of the curve next to the railroad? A. Yes sir.

Q. Is that perceptible, that rise?

A. Yes sir, quite steep.

Q. The terrain around Meridell park and the Owl Club is what?

(Testimony of Ralph L. Bowman.)

A. The Owl Club lies in a low space with rises on either side.

Q. The rise to the south, how far is it until you reach the crest of the hill.

A. Three-quarters of a mile.

Q. Do you recall what gear you were in coming over the hill there?

A. I had to shift to low to pull the hill.

Q. After getting to the crest and over how were you running?

A. I was shifting into high, coming down the hill.

Q. How fast were you driving?

A. Between thirty-five and forty miles an hour.

Q. Did something occur at the Owl Club?

A. Yes sir.

Q. State to the jury what happened, what you observed as you came down the highway as to the bus and other cars?

A. The first I saw the bus there was another car trying to pass it.

Q. How far down the road was that from you?

A. Half a mile.

Q. Was the bus moving at that time?

A. It appeared to be moving.

Q. Tell what else you saw?

A. Well sir, this car, it looked like it passed one car and was attempting to pass the bus, I was watching him; there wasn't too much distance between the bus and my truck.

(Testimony of Ralph L. Bowman.)

Q. How far was this car—withdraw that—how far away were you at that time from the bus?

A. About one city block.

Q. What did you observe after that?

A. By that time this fellow's car couldn't get around the bus to let me by and he ducked back, at that time I was on the bus or close to the bus and saw some children jumping off the right hand side, at that time I realized the bus was stopped?

Q. How far were you away at that time?

A. About five or ten feet.

Q. Who did you see getting off, was it one or more?

A. I could see a group of legs under the door of the bus, the door appeared to swing out and I could see their legs under this door.

Q. What happened then, go ahead?

A. The next thing I knew I had hit this boy.

Q. What did you do?

A. Well, I don't really know, at first I kind of coasted to a stop.

Q. Where were you when you first saw the boy you hit, where was your truck?

A. Right to the side of the bus?

Q. Alongside the bus? A. Yes sir.

Q. Do you know what part of the truck, you were driving, hit the boy?

A. The right front headlight.

Q. What did you do with reference to coasting, what do you mean by that?

(Testimony of Ralph L. Bowman.)

A. I don't recall stepping on the brake or don't recall what happened just then, I could see the boy laying on the front of the truck?

Q. You coasted to a stop? A. Yes sir.

Q. How far did you travel, if you know?

A. A hundred feet at least.

Q. Did you—where did you stop the truck as to being in your lane or traffic?

A. I don't think I pulled off the highway, I just wanted to get stopped as quick as I could,

Q. Did you get out of the truck?

A. Yes sir. [117]

Q. What did you observe?

A. When I stopped I saw the boy slide off the front of the truck.

Q. Was the boy still on the truck until you stopped? A. Yes sir.

Q. Did you get out and run around to the front of the truck? A. Yes sir.

Q. What did you see?

A. The boy was laying in front of the truck.

Q. How far from the truck?

A. Right in front of it?

Q. How many feet away?

A. Immediately in front.

Q. The truck had a bumper did it?

A. A big heavy bumper, a wide bumper and he was lying on the bumper I guess.

Q. What part of the truck was he by? Was it the left or the right side?

(Testimony of Ralph L. Bowman.)

A. Right in front of the right front tire.

Q. You picked up the child?

A. I picked the boy up, at that time I saw this bus driver running up to me and I told him to get one of these cars turned around to take him to town and he said "here comes the patrolman" at that time he stopped in the middle of the road half turned around and I got in the back with him and went to the hospital. [118]

Q. Was the patrolman out of his car at that time? A. No.

Q. Did you have a quilt there? A. No sir.

Q. Did you have a tarp out there?

A. No sir.

Q. You had the child in your arms?

A. Yes sir.

Q. Where did you put him?

A. On my lap, in the car.

Q. Where did you sit?

A. In the back seat.

Q. Where did you go?

A. St. Anthony's hospital.

Q. With the road patrolman? A. Yes sir.

Q. Where did you go then?

A. Back to the scene of the accident?

Q. After you left the hospital?

A. Yes sir.

Q. Where did this little boy ride to the hospital?

A. In the back seat of the car on my lap.

(Testimony of Ralph L. Bowman.)

Q. And you returned to the scene of the accident with Mr. Howe? A. Yes sir. [119]

Q. And later on you left the scene of the accident? A. That's right.

Q. Were you there when the bus came back?

A. The bus was there when we got out.

Q. Were you there when the tests were made on the blinker lights? A. Yes sir.

Q. Were the front blinker lights working?

A. No sir.

Q. Were the rear blinker lights working?

A. No sir.

Q. Did you see any blinker lights working as you approached the bus?

A. No, I saw nothing to indicate the bus was stopped, it appeared to be moving to me.

Q. Was there an arm out? A. No sir.

Q. Was the bus parked in the lane of traffic?

A. Yes sir.

Q. Was there a shoulder to the west?

A. Yes sir.

Q. How wide was that shoulder?

A. About five feet wide.

Mr. Peterson: That is all Mr. Bowman, you may examine Mr. Davis. [120]

Cross-Examination

By Mr. Davis:

Q. Mr. Bowman, you spoke just now about coming around a curve at the railroad track, just before you got over the raise going to Meridell Park,

(Testimony of Ralph L. Bowman.)

do you mean to say that just after you pulled up the hill after you left the railroad you came to Meridell Park? A. No sir.

Q. How many miles is it from Meridell to that Portneuf Hill?

A. I don't know, you come over that hill and there is another little raise.

Q. Your truck was empty? A. Yes sir.

Q. What hill did you shift on?

A. I never got in high gear after I got up the Portneuf hill until I got on the other raise.

Q. That is the steepest hill? A. Yes sir.

Q. After you got on the Portneuf hill you didn't have to stay in low?

A. No sir, I shifted into second and shifted down to low on the second.

Q. There is another hill after the Portneuf before you get to Meridell that you have to shift to low?

A. I didn't get speed up after I got up Portneuf Hill before I got to the second raise. [121]

Q. You had to shift into low twice?

A. That's right.

Q. How far from the top of the Portneuf Hill is it to Meridell Park?

A. I don't really know, it is close to a mile or a little more.

Q. You came up past that, you passed what used to be the old Golf course? A. Yes sir.

Q. How far is it from that to Meridell park?

(Testimony of Ralph L. Bowman.)

A. I don't know in mileage.

Q. You had travelled that road repeatedly in hauling gas with your truck?

A. Not very often.

Q. How many times within a year prior to this had you gone over that road?

A. Four or five times.

Q. You had travelled it repeatedly with your own touring car?

A. At that time I hadn't too many times.

Q. You knew that the school bus operated on that road?

A. I never saw the bus there; I never gave it any thought about the school bus being there.

Q. You knew it was about time for school to be out?

A. I didn't compare the time with school time, I never [122] gave it any thought as far as school was concerned.

Q. You are familiar with the condition at the Owl Club and Meridell Park as to residences?

A. Not very well.

Q. You went back out after the accident?

A. Yes sir.

Q. You looked it over out there?

A. Yes sir.

Q. You knew that children couldn't go anywhere but east after they got out of the bus?

A. I never knew there was any residences up there.

(Testimony of Ralph L. Bowman.)

Q. You knew there wasn't any residences on the West? A. I could see that.

Q. Have you testified that you knew if they got out that they would have to go east?

A. There is nothing on the other side to go to.

Q. The only place would be across the street or the road? A. Yes sir.

Q. You remember testifying at the Coroner's inquest? A. Yes sir.

Q. I will ask you, first I will show you this and then ask you if you were asked and if you so testified: You were asked how far you were from the school bus when you noticed the first youngster get off? A. Yes sir. [123]

A. Yes sir, I did answer that.

Q. You knew the danger of passing the school bus when they were stopped?

A. Yes sir, I do.

Q. You never passed a bus before when it was stopped?

A. No, I never met a bus there before.

Q. You had met busses at other places?

A. Yes sir.

Q. You never passed one that was stopped?

A. No sir.

Q. You always did stop for them?

A. Yes sir.

Q. Now, Mr. Bowman you were not calm and collected at that time, at the time of the accident?

A. No.

(Testimony of Ralph L. Bowman.)

Q. You don't remember all of the details?

A. Of course not.

Q. You knew that it was a serious matter to pass a school bus that was stopped unloading children? A. Yes sir.

Q. You were greatly concerned after this happened? A. Yes sir.

Q. Did you mean to indicate Mr. Bowman when you described this truck that it is a truck that you can load things on and off or that it is a regular oil tank fastened on the truck; built for the purpose of containing oil [125] and hauling oil?

A. It is a compartment gasoline tank.

Q. It cannot be used as a pick-up?

A. Yes sir.

Q. You take the tank off?

A. It has a compartment in the back.

Q. How large a compartment?

A. About five feet, the width of the truck.

Q. And the truck holds a thousand gallons of gas. A. Yes sir.

Q. That purpose of it was to haul gas and petroleum products and deliver them to the customers?

A. Yes sir.

Q. It wasn't used for any other purpose?

A. No sir.

Q. It contained a tank on the truck that held a thousand gallons of gas?

A. Yes sir.

Q. Now, you, as I understand it, are not able to say and don't care to estimate at this time how

(Testimony of Ralph L. Bowman.)

far it is from Meridell park where the unfortunate accident occurred to the top of Portneuf Hill?

A. I really don't know.

Q. You don't know how far it is from there to where you shifted gears the other time?

A. No sir. [126]

Q. As you approached you saw a number of cars in this line? A. I saw the bus and one car.

Q. You just saw one car. A. Yes sir.

Q. That car was trying to pull out you thought?

A. It was out in my lane.

Q. You were apprehensive about that?

A. It was drawing my attention and not seeing the bus pull off I presumed it was moving.

Q. You knew it might stop, you knew that it carried children?

A. I had no idea that the bus would be stopping in the middle of the highway, it never entered my mind, there was never an indication that the bus should be stopping.

Q. Do you mean it was over in your side, directly in the middle of the highway?

A. In the middle of his lane of traffic.

Q. Where were you?

A. In my line of traffic.

Q. You stayed in your line of traffic?

A. Yes sir.

Q. The fact of the matter is, when you saw this child you though you could go on by?

A. No sir, at the time I saw these children were

(Testimony of Ralph L. Bowman.)

getting off, I was right on the bus. [127]

Q. You didn't think anything about it when you saw the children getting off?

A. When I saw the children getting off I couldn't have stopped. If I had been expecting it at that close range I don't know what I would have done.

Q. Even when you saw the children getting off you could have stopped much shorter than 133 feet, in a much shorter distance?

A. Yes, if I hadn't hit the little boy I could have stopped immediately.

Q. You didn't try to stop?

A. I don't know what I did. I immediately stopped when I realized what happened; I could stop immediately.

Q. You unfortunately didn't pay any real attention to the school bus until it was too late.

Mr. Peterson: We object to that as being argumentative.

The Court: He may answer.

A. My attention was on the car and not the bus.

Q. You didn't know the bus had stopped?

A. There was nothing to give me any indication that the bus was stopped.

Q. You didn't know the bus had stopped?

A. No, I didn't know the bus had stopped.

Q. When you saw the cildren you knew it was stopped? A. Yes sir. [128]

Q. Now, to the east of you and to the east of

(Testimony of Ralph L. Bowman.)
where you hit the boy the road is very much wider than it is in that section, that is, to the east of where you hit the boy the road is very much wider than its natural roadbed, and a person coming north, in the direction you were driving could have turned off to the east and could stay on the road for as much as twenty feet and be on a good roadway?

A. If I had time to realize that I would have time to stop.

Q. I was trying to get that clear Mr. Bowman, at the time you approached the bus and at the time you unfortunately struck the boy; to the right hand side or to the east there was a distance there of at least twenty feet that you could have turned off and been on good solid ground?

A. Yes sir, if I had been going to stop and pull off, it was plenty wide.

Q. Mr. Bowman, the seat on the truck you were driving what is the height of that from the ground as compared to the seat of an ordinary touring car?

A. It is a little higher?

Q. How much higher would you say?

A. About one foot I imagine.

Q. As you came from the south that would give you that much more height and you could see where the school bus was sooner than if you were sitting in an ordinary car? [129]

A. I think so, yes sir.

Q. Did you honk your horn as you approached this bus?

(Testimony of Ralph L. Bowman.)

A. I hit the horn about the time I was right on the bus.

Q. Why did you honk your horn?

A. Instinct I guess, I really don't know why; it is the natural thing to do.

Q. Did you put your foot on the brake the same time you honked the horn? A. I don't know.

Q. You don't know whether you coasted to a stop or whether you put on the brake after you saw what had unfortunately happened?

A. Yes sir, I realized I was coasting along at that time and I applied the brake before that, until that time I don't know exactly what I did.

Q. When did you apply the brake with reference to the time you honked your horn?

A. I really don't know.

Q. The only reason for honking the horn was to warn these children and make them get out of the way? A. I guess so, yes.

Q. You only saw two cars?

A. All I saw was this bus and the other car trying to pass the bus.

Q. Did you afterward see other cars? [130]

A. After I stopped I saw several.

Q. If you had seen the other cars that would have made you apprehensive; if you saw those other cars you would have thought that you should have stopped?

Mr. Peterson: Objected to as argumentative.

The Court: The witness said he didn't see them.

(Testimony of Ralph L. Bowman.)

Mr. Davis: That is all.

Redirect Examination

By Mr. Peterson:

Q. You didn't intend to hurt anyone that day?

A. No, that is the worse thing that ever happened in my life.

Q. You are sorry it happened?

A. Yes sir, very.

Mr. Peterson: That is all.

Recross Examination

By Mr. Davis:

Q. Mr. Bowman, did I say anything at all to you that made you think that I was trying to indicate that you wanted to hit this boy?

A. No sir.

Q. And you don't think that I was trying to show that you did it deliberately? A. No sir.

Q. You wasn't paying any attention to the school——

Judge Baum: Now we object to this, counsel.

The Court: I think that was testified to fully, if he understands it he may answer.

A. I was paying attention, yes sir.

Q. You were driving carefully and all right, in your opinion? A. Yes sir, I believe so.

Q. You are not at fault in any way?

Judge Baum: Objected to as calling for a conclusion.

The Court: Sustained.

Mr. Davis: That is all.

(Testimony of Ralph L. Bowman.)

Mr. Peterson: That is all. The defense rests.

Mr. Davis: We have no rebuttal.

(Admonition to the Jury.)

The Court: We will recess at this time until 10 o'clock tomorrow morning.

10 A. M. June 3, 1949

(Argument of Counsel to the jury.) [132]

INSTRUCTIONS

Ladies and Gentlemen of the Jury: The evidence in this case has all been submitted to you; you have heard the arguments of counsel and if you will give me your attention for a few minutes I will advise you as to the law applicable to this particular matter which you have under consideration. It is your duty as jurors to accept the instructions of the Court as the law in this case.

The issues are made up by the complaint of the plaintiff and the answer of the defendant. The complaint alleges the residence of the respective parties, alleges the fact that the plaintiffs are husband and wife, also alleges the corporate capacity of the defendant Covey Gas and Oil Company. The plaintiffs allege in their complaint that because of the negligence of the defendant in the operation of their truck in passing a school bus of Independent School District Number 1, while the deceased Gary Checketts was alighting from or leaving the bus, and that the driver of the truck of the defendant drove the tank against the body of the said Gary

Checketts, and allege that as a result of said negligence the said Gary Checketts was killed; that by reason of this the plaintiffs have been damaged in the loss of their son in the amount of $75,000.00 and by reason of the cost of burial of their son they have been damaged in the amount of $407.50 and they ask for judgment against the defendant in the amount of $75,407.50.

The defendant filed its answer admitting the residence of the plaintiffs, and admitting the corporate capacity of the defendant, admitting the ownership of the truck in question here, admitting that the driver of the truck was in its employ; in its answer the defendant makes certain affirmative allegations and alleges contributory negligence, which will be defined to you in these instructions, defendant alleges in its answer that the accident, injury and death of Gary Checketts was caused by the negligence of the driver of the school bus; also alleges in its answer that the driver of their truck was acting in a careful and prudent manner at the time of the accident and injury resulting in the death of said Gary Checketts, and ask that the plaintiffs take nothing by reason of their complaint.

Those briefly are the issues which you must pass upon, and are the claims of the respective parties; however, you are to decide the issues from the evidence introduced and not from what may appear from the various claims of the parties.

You are instructed that Covey Gas and Oil Company, a corporation, defendant, was on the 24th

day of February, 1947, the date of the death of Gary Checketts, the owner of a 1½ ton gas truck, bearing Idaho License No. 1B-806, and that at said time and at all times mentioned in the plaintiffs' complaint, Ralph L. Bowman was an employee of said Covey Gas and Oil Company, acting upon the business of his employer and within the scope of his employment.

The issues here are plain. It is a question as to whether or not the defendant was negligent and as to whether that negligence was the proximate cause of the death of the deceased Gary Checketts. This case should be considered by you as between the plaintiffs and the Covey Gas and Oil Company.

The laws of the State of Idaho provide that the parents may maintain an action for the death of a minor child and you are instructed that the plaintiffs in this case as the parents of Gary Checketts, deceased, are entitled to maintain this action against the defendant Covey Gas and Oil Company.

In passing upon the issues in this case, Ladies and Gentlemen, you will bear in mind that the burden is upon the one who asserts the existence of a fact, to establish it, and in a suit of this character to establish the fact by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence, that is the meaning of the word "preponderance"—evidence which convinces you that the truth lies upon this side or that

side, evidence which is more convincing and more persuasive.

In this case the burden is upon the plaintiff in the first place to show by a preponderance of the evidence that the defendant was guilty of negligence in the respect charged in the complaint, and that the death of Gary Checketts and the damage to the plaintiffs was by reason of and because of the defendant's negligence.

There is an allegation of contributory negligence set forth in the pleadings and regarding contributory negligence I will say that it is called contributory negligence because it is charged to be the negligence of the person upon whose behalf the original claim is being made, or in this case the negligence of the deceased Gary Checketts.

The same definition, however, applies to negligence whether it be primary or contributory.

In consideration of the matter of contributory negligence the jury should take into consideration the conditions as they existed at the time of the accident, the age of the person charged with the contributory negligence and his ability to reason and distinguish between acts that would be negligent and those which would not be negligent. In other words, you will determine whether or not Gary Checketts was capable of being contributorily negligent, and whether such contributory negligence, if any existed, was the proximate cause of the accident.

There is, until the contrary is proved, a presumption that the deceased, Gary Checketts, was exer-

cising due and proper care for the protection of his person and the preservation of his life at the time of the accident; this presumption arises from the instinct of self-preservation and the disposition of a person to avoid personal harm. This presumption is not conclusive, but is a matter to be considered by the jury in connection with all the other facts and circumstances of the case in determining whether or not the deceased Gary Checketts was guilty of contributory negligence at the time of the accident.

You are instructed in this connection that in determining whether a child of the age of Gary Checketts is guilty of contributory negligence, that the child's actions cannot be considered in the same light as the action of an adult under similar or identical circumstances or conditions, and that Gary Checketts could only be expected to act or conduct himself as the ordinary child of his age, experience and mental capacity, under the same or similar conditions.

Speaking generally, negligence may be defined as the performance of some act, the doing of some thing, which under the circumstances a reasonably prudent and careful person would not do. You will see that it is a question of what ordinarily reasonably prudent and careful persons, properly regardful of the rights of others, would do under the particular circumstances; or the converse, it is the leaving undone of something, some act, which such prudent and reasonably careful person would have

done under the circumstances. It may be negligence of commission or negligence of omission.

You will notice that I call your attention to the fact that it is what an ordinarily careful and prudent person would do under the particular circumstances; not what such person would do under ideal circumstances, but under the circumstances existing at the time involved here as shown by the evidence.

Proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, but in order to warrant a finding that the negligence is the proximate cause of an injury it must appear from the evidence that the injury was the natural and probable consequence of the negligence and ought to have been foreseen as likely to accur by a person of ordinary prudence in the light of the attending circumstances.

There must be, as you see, a direct causal connection between the negligence of the defendant and the injury to Gary Checketts which resulted in his death. In this case the negligent acts of the defendant must be the proximate cause of the injury, that is the real cause of injury, in order that the plaintiffs may recover.

You are instructed that on February 24, 1947, it was the duty of every parent, guardian or other person having charge of any child between the ages of eight and eighteen years, to send such child to a public, private or parochial school for the entire

year during which the public schools were in session in the District in which the parents and plaintiffs herein lived.

You are instructed that on the 24th day of February, 1947, Section 48-1101 Idaho Code Annotated provided:

"It shall be unlawful for anyone to drive any motor vehicle past a truck, bus or other vehicle being used by a school district to transport children to or from school, at a time when anyone is getting on or off said truck, bus or other vehicle."

The word "past" as used in the section of the Idaho statute which I have just quoted is subject to the definition given to the word under the circumstances here. It means to go beyond, further on, or on the other side of. Under the law as quoted to you it is unlawful for anyone to drive a motor vehicle past a school bus at a time when anyone is getting on or off said school bus, regardless of from which direction the vehicle may be approaching the school bus.

You are instructed that Ralph L. Bowman, the driver of the truck owned and operated by Covey Gas and Oil Company, as in the evidence, and herein referred to, was charged with knowledge of the law which forbade him passing the bus while school children were being received or discharged. Violation of this law is negligence per se. There was a duty on his part to obey the law.

You are instructed that Gary Checketts, the deceased child, had a right to expect that Ralph L. Bowman, the driver of the truck that struck the de-

ceased child, would stop his truck or motor vehicle and not drive it past a school bus stopped for the purpose of unloading or loading school children, and had a right to believe and expect that the driver of said truck would comply with the law as hereinbefore given you in these instructions.

You are instructed that it is a matter of common knowledge that children may at unexpected moments run upon or across the part of the thoroughfares used for vehicles. The use of such thoroughfares by such children, motorists must be assumed to have knowledge of, and where their presence can be observed a degree of care commensurate with the ordinary emergencies presented in these instances must be exercised. One driving a vehicle must not assume that children of immature years will exercise the care required for their protection and will not expose themselves to danger.

You are instructed as a matter of law that Gary Checketts, having no control or authority whatever as to the operation of the school bus and not having participated in any way in the driving or the operation of the same, that any negligence on the part of the driver or operator of the school bus, if you find there was any negligence on his part, could not be imputed to the said Gary Checketts and he would not be guilty of contributory negligence by reason of any act of the operator of the school bus.

Another law of the State of Idaho provides that it shall be unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly

in wilful or wanton disregard of the rights and safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property.

In passing upon the questions of fact in this case you will determine the credibility to be given the testimony of any witness and you have a right to take into consideration his or her interest, if any, in the result of the case, his or her demeanor on the witness stand, his or her candor or lack of candor, and all other facts and circumstances which could influence you in determining whether or not a witness has told the truth. You will determine the weight to be given to the testimony of each witness called to the stand.

You are instructed that you should not consider any evidence that may have been offered and refused by the ruling of the Court and you should not consider any evidence ordered stricken from the record. Your verdict must be based on evidence admitted as presented from the witness stand. I think I should tell you also that if you have gathered during the course of the trial, because of rulings or because of any remarks made, that the Court has any opinion as to the facts in this case, you will disregard that entirely. If the Court had any opinion, you would not be concerned with that at all, because this is your responsibility and the Court cannot help you or assume any responsibility in passing upon the facts.

If, after deliberating on this matter, you determine that the plaintiffs are entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount to be allowed by each stating the amount you think should be allowed, by adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict.

I will say that you should not take any particular statement or any particular portion of the instructions and consider that as being the entire law of the case, and you should not place any undue emphasis on any particular portion of the instructions, but you should consider the instructions given you as a whole, and when so considered you should apply them to the facts submitted to you.

You are instructed that the Court is the judge of the law and it is his responsibility to pass on all questions of law, and you are obliged, under your oaths, to take the instructions of the Court as being the law applicable here. However, in the same degree, you are the judges of the fact and it is your duty to pass on all questions of fact. I cannot help you in this; it is entirely and wholly your responsibility.

You are instructed that should you find in favor of the plaintiffs, then, in determining what damages should be allowed as under all the circumstances of

the case may be just, you are to presume that pecuniary loss resulted by reason of the relationship of parent and child existing between the plaintiffs and the deceased. You may consider the health and intelligence of Gary Checketts and his affection and devotion to his parents. You may also consider the loss of his society and companionship suffered by his parents, the comfort and companionship, he would have afforded to them, his aid, advice, support and earnings. You are told in this connection that a son reaches his majority at 21 years of age.

You are instructed that if you find for the plaintiffs in this case, that in fixing the amount of damages that will compensate them you are entitled to take into consideration that each of the plaintiffs has been injured in the loss of their son and that each has been injured in the loss of the affection, companionship and in the loss of whatever support they and each of them may have been justified in expecting to receive from their deceased son, after he reached his majority.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed on a verdict your foreman alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which will correctly reflect your finding. You will see one form contains a blank space for the amount of damages you allow if you

find in favor of the plaintiffs, and the other form has no blank space; this, of course, you will use if you find for the defendant. When you arrive at a verdict it will be returned into open Court.

The Court: The alternate jurors will now be excused and the bailiff will be sworn. It will be necessary to take up a matter with counsel. You will be excused for a moment and I will call you back.

OBJECTIONS TO INSTRUCTIONS

The Court: Does the Plaintiff have any objections?

Mr. Davis: No objections to the instructions given by the Court. I do not know the number of my requested instruction perhaps the Reporter will insert the number. Plaintiff's requested instruction Number 1, I want to except to the Court's failure to give the instruction stating that the verdict should be arrived at in accordance with the state law, that three-fourths of the jury in a civil case such as this, can return a verdict, by reason of the diversity of citizenship here and by reason of what we believe is the law in this connection.

The Court: Do you have any objections on the part of the defendant.

Judge Baum: Yes, we desire to object to the failure of the Court to give our instructions on the statute as to stopping in the roadway. I do not know the requested instruction number but will ask the reporter to make it a part of the record.

"You are instructed, Ladies and Gentlemen of the jury that section 49-526 Idaho Code, formerly section 48-524, I C A reads as follows: "Stopping on highway—a. No person shall park or leave standing any vehicle whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon such highway.

"b. Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

"c. The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

Defendant also excepts and objects to the giving of the instruction in reference to the negligence of the driver of the school bus, taking the question of the negligence of the driver of the school bus away from the jury.

The Court: I gave that instruction.

Judge Baum: Yes, but it was so limited and in our opinion did not state the law.

We except and object to the Court's giving the instruction to the jury that the failure of the driver of the truck Mr. Bowman to stop for the school bus was negligence per se, at the most it could only be prima facie negligence.

The Court: The record may show this is in the absence of the jury. I am always anxious to have any criticism of the instructions that counsel may have. If counsel think the Court has erred in any instruction I am always glad to have counsel point that out and I would be glad to always call the jury back and correct or attempt to correct it. That is the purpose of my discussion with counsel in Chambers.

Judge Baum: We think it was error not to instruct the jury in accordance with our requested instruction that the jury should not take into consideration any mental suffering and mental anguish of the parents. I will ask the Reporter to copy our requested instruction in the record at this point.

"Defendant's requested Instruction no.——

"You are instructed Ladies and Gentlemen of the Jury, that if you find the plaintiffs are entitled to

recover you should not take into consideration the mental suffering and mental grief of the parents by reason of the death of Gary Checketts."

In addition to those we have called to the attention of the Court, we object to the Court's not giving our requested instruction which reads: "You are instructed Ladies and Gentlemen of the jury, that one of the defenses relied upon by the defendants is the "sudden appearance" defense, which defense is effective although defendant might be negligent in the operation of the said truck in question, provided the said driver operating the truck could not have avoided the accident complained of even though he had not been negligent."

We feel the Court erred and we object to the Court's not giving our instruction which reads: "You are instructed Ladies and Gentlemen of the Jury, that the school bus driver owed to the occupants of the said school bus a duty to choose a safe place to stop the school bus, having in mind the age of the children riding upon the bus and their ability to look out for their safety and if the driver opens a door for a child to alight, knowing the child's path will take him across the road in a place of danger, without any warning as under the circumstances would seem appropriate then the driver and operator of the said school bus is guilty of negligence, and if you further find that such negligence on the part of the school bus driver was the proximate cause of the accident then you should find for

the defendants."

The Court: I don't think there is any evidence to support that. Now, Judge Baum, I will let you give me your definition of the difference between "per se" and "prima facie".

Judge Baum: "Per se" means it is there as a matter of law and they cannot overcome it, and the other "prima facie" merely shifts the burden of proof.

The Court: Call the jury in Mr. Bailiff. Ladies and Gentlemen of the jury, it has been called to my attention that possibly one of my instructions should be changed somewhat: I instructed you that Ralph L. Bowman, the driver of the truck owned and operated by Covey Gas and Oil Company as in the evidence and herein referred to, was charged with knowledge of the law which forbade him passing the bus while school children were being received or discharged, that violation of this law is negligence per se. I should have used the term prima facie. Prima facie evidence that he did so is evidence that may be overcome by other evidence. Per se counsel suggests, is that which cannot be overcome. I want to correct that and I will read it as it should be "You are instructed that Ralph L. Bowman, the driver of the truck owned and operated by Covey Gas and Oil Company, as in the evidence and herein referred to, was charged with knowledge of the law which forbade him passing the bus while school children were being received or discharged. Viola-

tion of this law is prima facie negligence. There was a duty on his part to obey the law.

You will take that with all the other instructions I have given you, of course, with the correction I have now made.

You may retire again for a moment and you will be recalled again.

Now that the jury has retired again, is th*at* any further objection?

Mr. Davis: If Your Honor Please, I am confused now, it is my understanding of the law that a violation of a section of the statute that was in effect at the time of this accident was an indictable misdemeanor and was negligence per se in and of itself. We except to the instruction to the jury that it is only prima facie evidence of negligence. It is prima fecie negligence to violate an ordinance and any of a number of laws, but violation of that statute is negligence in and of itself.

Judge Baum: We requested two sections of the Statute I excepted and objected to your Honor not giving section 49-526, I object and except to your not giving only 48-519: "Signals on starting, stopping or turning. a. The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety and if any pedestrian may be affected by such movement shall give clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as

required in this section plainly visible to the driver of such other vehicle of the intention to make such movement.

"b. The signal herein required shall be given either by means of the hand and arm in the manner herein specified, or by an approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible both to the front and rear the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given by means of the hand and arm, the driver shall indicate his intention to start, stop or turn by extending the hand and arm horizontally from and beyond the left side of the vehicle."

I withdraw my exception to the Court's not giving section 49-526.

The Court: I don't believe that the evidence supports the giving of that instruction. I am somewhat disturbed over the correction I have now made in the instruction called to my attention, however, I think it would be more confusing to the jury to try to straighten it out. I don't think the technical difference in the terms is sufficient to be prejudicial.

You may recall the jury Mr. Bailiff.

Now, Ladies and Gentlemen of the jury, you may retire to consider your verdict.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court for the District of Idaho, and

I further certify that I took the evidence and proceedings had in and about the trial of the above entitled cause in shorthand and thereafter transcribed the same into longhand (typewriting) and

I further certify that the foregoing transcript consisting of pages numbered consecutively to page 152 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof I have hereunto set my hand this 12th day of October 1949.

/s/ G. C. VAUGHAN.

[Endorsed]: Filed October 12, 1949.

In the District Court of the United States, for the District of Idaho, Eastern Division.

No. 1524

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY, a corporation,

Defendant.

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint and all amendments thereto.

2. Answer.

3. Plaintiffs' motion to strike as filed by the Plaintiffs to certain parts of defendant's answer, dated 11th day of April, 1949, and the order granting the motion.

4. Motion of the defendant dated the 1st day of June, 1949, wherein defendant sought an order bringing in as a party defendant Ralph L. Bowman, and the order of the Court made thereon.

5. The entire Transcript of the evidence taken at the trial.

6. The entire Transcript of all proceedings which

were stenographically reported at the trial, including the instructions of the Court.

7. All instructions requested by the defendant which were not given by the Court.

8. Verdict.

9. Judgment entered thereon.

10. Minutes of the Court.

11. Motion for new trial.

12. Order denying new trial.

13. Notice of Appeal.

14. This designation.

A copy of the entire transcript of the evidence as referred to in number three above, and a copy of the proceedings stenographically reported, as referred to herein, will be served and filed as soon as such transcript, or transcripts, are completed by the reporter.

Dated this 2nd day of September, 1949.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant and Appellant.

[Endorsed]: Filed September 6, 1949.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 1524

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs-Respondents,

vs.

COVEY GAS & OIL COMPANY OF IDAHO, a corporation,

Defendant-Appellant.

STATEMENT OF POINTS

Appellant states that the points upon which it intends to rely on appeal in the above entitled action, and it deems the entire record on appeal (all except Motion to Bring in Independent School District No. 1, Class "A" Pocatello, Idaho, as Party-Defendant) as necessary for the consideration of the points to be relied upon, namely:

The Trial Court Erred in the Following Particulars:

(a) In refusing to grant the appellant's Motion for New Trial, such Motion being filed and based upon the proposition that the verdict of the jury was excessive in amount and contrary to law and that the amount of the verdict arrived at by the jury is not an amount authorized or allowed by the measure of damages provided in such cases.

(b) In refusing to grant the defendant's Motion for New Trial, which Motion was made upon the

ground that the verdict of the jury was the result of mistake, passion, prejudice or improper motive and that said verdict was the result of bias and prejudice against the defendant.

(c) In refusing to grant defendant's Motion for New Trial upon the ground in said Motion stated that the court refused to instruct the jury that they did not have a right to take into consideration the mental suffering and mental grief of the plaintiffs by reason of the death of Gary Checketts and, particularly, did the court err in refusing to give the foregoing substance of defendant's requested instruction in view of the fact that an instruction was given by the court to the jury advising them that they could, in arriving at the amount of damages, consider loss of companionship, loss of society and comfort, but in such last mentioned instruction the jury was not advised as to whether those were the only items of damages which they could consider.

(d) In refusing to give defendant's requested instruction, such requested instruction asking the court to instruct the jury that, in arriving at the amount of damages, they did not have a right to take into consideration the plaintiff-parents' mental suffering and mental grief resulting to them by reason of the death of their minor child.

(e) In refusing to grant defendant's Motion requesting that Ralph L. Bowman be brought into the trial of the case and be made a party-defendant therein, which Motion was made in writing by de-

fendant prior to the commencement of the trial, Ralph L. Bowman being the operator and driver of the defendant-company's truck at the time and place of the accident upon which the suit is brought, and in signing the order refusing to bring in such Ralph L. Bowman.

(f) In refusing to give defendant's requested instruction that the operator of the school bus in which the deceased, Gary Checketts, was riding, was, in the operation thereof, in violation of Section 48-519, Idaho Code, such Section providing for the duties of persons starting, stopping or turning on the highway, as the same pertains to the operation of school bus in which Gary Checketts was riding.

(g) In refusing to give the following instruction: "You are instructed, Ladies and Gentlemen of the Jury, that one of the defenses relied upon by the defendant is the 'sudden appearance' defense, which defense is effective although defendant might be negligent in the operation of the said truck in question, provided the said driver operating the truck could not have avoided the accident complained of even though he had not been negligent."

/s/ O. R. BAUM,
/s/ BEN PETERSON,
Attorneys for Defendant-Appellant.

Receipt is hereby acknowledged this 27th day of

October, 1949, of a copy of the foregoing Statement of Points.

/s/ B. W. DAVIS,
Attorney for Plaintiffs-Respondents.

/s/ L. S. RACINE, JR.,
Attorney for Plaintiffs-Respondents.

[Endorsed]: Filed October 28, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers, to-wit:

Complaint

Answer

Motion to Strike filed April 13, 1949

Minutes of the Court of May 20, 1949 ruling on Plaintiff's Motion to Strike

Defendant's Motion to bring in Ralph L. Bowman as party defendant

Minutes of the Court of June 1, 1949 ruling on Motion to bring in party defendant, etc.,

Minutes of the Court of June 2, 1949.

Verdict

Minutes of the Court of June 3, 1949

Judgment

Transcript of Evidence

Instructions requested by the defendant which were not given by the Court (included in Transcript of Evidence)

Motion for New Trial

Order Denying Motion for New Trial

Notice of Appeal

Designation of Record on Appeal

Statement of Points

Order Extending Time for Filing Appeal in Circuit Court.

are that portion of the original files as designated by the appellant and as are necessary to the appeal under Rule 75 (RCP).

In witness whereof, I have hereunto set my hand and affixed the seal of this court this 3rd day of November, 1949.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 12398. United States Court of Appeals for the Ninth Circuit. Covey Gas and Oil Company, a corporation, Appellant, vs. Norell T. Checketts and Twila Checketts, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed November 9, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation,

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Appellees.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

O. R. Baum, Ben Peterson and Darwin D. Brown
Attorneys for Appellant
Pocatello, Idaho

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FILED
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PAUL P. O'BRIEN,

No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
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vs.

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Brief of Appellant

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O. R. Baum, Ben Peterson and Darwin D. Brown
Attorneys for Appellant
Pocatello, Idaho

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No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation,

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Appellees.

Brief of Appellant

COMPLAINT
(R. pp. 2, 3, 4, 5)

The complaint alleges that the amount in controversy exceeds the sum of $3,000.00.

That Norell T. Checketts and Twila Checketts are the mother and father, respectively, of Gary Checketts, now deceased.

That the defendant, Covey Gas & Oil Company, is a corporation organized and existing by virtue of the laws of the State of Idaho.

That the defendant is the owner of an oil tanker used in the operation of its business, bearing Idaho license number 1B-806.

That Ralph L. Bowman was an employee of the defendant corporation, and that on the 24th day of February, 1947, was acting as an agent of the defendant corporation, and did carelessly operate the oil tanker of the defendant upon U. S. Highway 30-91 in Bannock County, Idaho.

That said oil tanker operated by the defendant corporation's agent was operated negligently and carelessly.

That as a result of the negligent operation of the oil tanker, Gary Checketts, son of the plaintiffs, was killed.

That Gary Checketts was a bright and intelligent boy and would have contributed large sums of money to his parents and would have performed services and earnings of great value to his parents prior to his majority.

That his parents would have had great comfort and companionship in the society of their son.

That the plaintiffs have incurred in medical and hospital expense the sum of $407.50.

That they have suffered $75,000.00 general damages and have suffered punitive damages in the amount of $25,000.00.

ANSWER

(R. pp. 5, 6, 7, 8 & 9)

The answer of the defendant admits the residence of the plaintiffs, admits the marital status of the plaintiffs, and ad-

mits that the Covey Gas & Oil Company is an Idaho corporation.

Further, the defendant admits that it is the owner of the truck referred to in the complaint.

And admits that Ralph L. Bowman, the operator of the truck, was an employee of the defendant upon the 24th day of February, 1947, but denies the other allegations in that paragraph of the complaint.

The defendant further pleaded affirmative defenses:

I

That the said Gary Checketts did not exercise care and caution in the premises to avoid the accident.

II

That the operator of the school bus in which the said Gary Checketts had been riding did not exercise ordinary care, caution and prudence in the premises to avoid the accident and that the accident was a result of the negligence of the operator of the school bus, Robert R. Smith.

III.

The defendant further alleges that the defendant's operator of the tanker, Ralph L. Bowman, exercised reasonable care at the time and place of the accident.

IV.

Further the defendant alleges in his answer that an action had been previously instituted in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, wherein Ralph L. Bowman was defendant and likewise the Covey Gas & Oil Company, appellant herein, was defendant, and that an order of dismissal was entered by appellee in that case as against Covey Gas & Oil Company, and that said cause as to it was dismissed but is still pending against Ralph L. Bowman, growing out of the same accident.

JURISDICTION

This is a suit of a civil nature between citizens of different states, where the amount in controversy exceeds $3,000.00, exclusive of interest and costs, and the United States District Court has jurisdiction under Title 28, Section 41 U.S.C.A. (Judicial Code Section 24 Amended).

This appeal is from a final judgment of the United States District Court for the Eastern District of Idaho. The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction under Title 28 U.S.C.A. (Judicial Code Section 128, Amended).

STATEMENT OF THE CASE

This is an action for damages brought by the plaintiffs, Norell T. Checketts and Twila Checketts, for the alleged wrongful death of their son, Gary Checketts.

The defendant corporation, by and through its agents, servants and employees, operates a retail oil distributing service for Pocatello and region. Upon the 24th day of February, 1947, at approximately 4:00 P. M. of said day, the defendant's truck was being operated in a northerly direction along and upon U. S. Highway 30-91 in Bannock County, Idaho. The truck then and there, the property of the defendant corporation, was being operated at the time by Ralph L. Bowman, an agent of the defendant corporation. (R. pp. 27, 28).

The deceased, namely, Gary Checketts, was a student in the Pocatello Idaho, school system, and at the hour and upon the day hereinbefore set forth, the said Gary Checketts, a minor boy of approximately eight years, was riding in and being conveyed to his home from school by a school bus owned and operated by Independent School District No. 1, Class A. The school bus in which Gary Checketts, deceased, was riding was being at that time driven by an agent of the school district, Robert R. Smith. The operator of the school bus, driving in a southerly direction, stopped his said school bus upon the oiled portion of said highway above described and stopped said bus with all of the four wheels thereof upon the oiled portion of said roadway, which is at said place a two-lane highway. (R. p. 106). Gary Checketts, the deceased son of the plaintiffs herein, lived across said highway and to the east thereof, and the place where said school bus was stopped was directly opposite the home of Gary Checketts, deceased, which fact the school bus driver knew. Gary Checketts alighted from the school bus and ran around to the back of the school bus and started

across the highway to his home and was struck by the defendant's truck shortly after he had entered the east lane of the highway. The evidence further shows that the operator of the defendant's truck did not stop before passing said school bus. Gary Checketts was struck by the truck then being operated by the defendant's agent and was killed as a result thereof. The operator of the truck stopped his truck (R. p. 125) and with the assistance of a highway patrolman conveyed the little boy to the St. Anthony Hospital, Pocatello, Idaho, where shortly thereafter he died. Gary Checketts, at the time of the accident, was eight years of age and residing at the time with his mother and father approximately four miles south of Pocatello, Bannock County, State of Idaho, and at the time of the accident was attending the public schools in the city of Pocatello, and was at the time of the accident being conveyed back and forth from school to home by school buses owned by Independent School District No. 1, Class A. (R. p. 105).

The case was tried before a jury and before the Hon. Chase A. Clark, District Judge of the District Court of the United States in and for the State of Idaho, in and for the Eastern Division.

JUDGMENT

A verdict was returned by the jury in the amount of $35,407.50. Such judgment was entered thereon in such amount June 3, 1949, filed June 3, 1949.

The defendant corporation filed its motion for a new trial (pp 19, 20 and 21 of Transcript), which motion for

new trial was denied by the Hon. Chase A. Clark, United States District Judge, upon August 18, 1949, (pp 22, 23 and 24 of Transcript). Appeal was thence taken to this court (pp 25 and 26 of Transcript).

QUESTIONS PRESENTED

1. Whether or not a verdict of $35,407.50 is excessive for the death of a minor child, approximately eight years of age?

2. Should the Trial Court have reduced the amount of the verdict, such verdict being in the amount of $35,407.50?

3. Should this Court grant a new trial because of the excessiveness of the verdict?

4. Should this Court reduce the verdict in this case because of its excessiveness?

5. Should the Trial Court have instructed the jury that in arriving at their verdict, they did not have a right to take into consideration anguish and grief of the parents?

6. Should the Trial Court have, upon motion of the defendant, made Ralph L. Bowman, the operator of the defendant's truck, a party to the action?

The above and foregoing questions were raised by Defendant's Motion for New Trial (R. p. 19, 20 & 21); Defendant's Requested Instruction (R. p. 150 & 151); Defendant's Motion to bring in Ralph L. Bowman as party (R. p. 12 & 13) and Motion for New Trial (R. p. 19, 20 & 21); Notice of Appeal (R. p. 25); Designation of Record (R. p. 156 & 157); and this Brief.

SPECIFICATIONS OF ERRORS

I.

The Court erred in refusing to grant defendant's requested instruction pertaining to the matters and things that the jury did not have right to take into consideration in arriving at its verdict. The defendant requested that the Court instruct the jury that in arriving at the damages in this case, they did not hvae right to take into consideration mental suffering and mental grief by reason of the death of Gary Checketts, deceased. Such requested instruction was filed with the Court prior to the Court's instructing the jury and within the time provided for by the Federal Rules of Civil Procedure. (pp. 150 and 151 of Record).

II.

The Court erred in instructing the jury that in the event they found a verdict for the plaintiffs they could, in arriving at the amount of damages, consider loss of companionship, loss of society and comfort, which instruction is proper except the same was not limited to what items of damages they could not take into consideration, and in the absence of the requested instructed, implied that they could consider as an element of damages, grief and mental suffering of the parents. (pp. 147 of Record).

III.

The Court erred in refusing to grant defendant's motion for new trial upon the ground that the verdict was in an amount not authorized or allowed by the measure of damages provided for by statute in such cases. (R. pp. 20 & 21).

IV.

The Court erred in refusing to grant the defendant's motion for new trial upon the ground that the verdict returned by the jury was excessive and that bias and prejudice entered into the consideration thereof as a matter of law. (R. pp. 22-24).

V.

The Court erred in not granting the defendant a new trial for the reason that the verdict was excessive and the facts and circumstances of the case such as to incite prejudice by the jury, as a result of which the judgment was unreasonably augmented. (R. pp. 22-24).

VI.

The Court erred in refusing to grant the defendant's motion for new trial upon the ground that the jury was not instructed that, in arriving at the damages in this case, they did not have the right to take into consideration mental suffering and mental grief by reason of the death of Gary Checketts, dceeased. (R. pp. 22-24).

VII.

The Court erred in not granting defendant's motion, bringing in as a party to this suit, Ralph L. Bowman, a party without whose presence there could not be a complete determination of the controversy. (R. p. 13).

VIII.

The Trial Court erred in not reducing the verdict returned by the jury upon which judgment was entered to an amount authorized by law in such cases.

POINTS AND AUTHORITIES

I.

The law in Idaho does not allow damages for grief and anguish, and the Trial Court should have instructed the jury not to take these elements into consideration in arriving at their verdict.

American R. Co. of Porto Rico v. Santiago et al, 9 Fed. (2d) 753.

Humphreys v. Ash, 6 Atl. (2d) 436.

Gillette Motor Transport, Inc. et al v. Blair et al, 136 S.W. (2d) 656.

Burlington-Rock Island R. Co. v. Ellison et al, 134 S.W. (2d) 306.

Hemsell et al v. Summers et al, 138 S.W. (2d) 865.

Gulf, C. & S.F. Ry. Co. v. Farmer, 102 Tex. 235, Par. 3, 115 S.W. 260.

Hines v. Kelley, Tex. Com. App., 252 S.W. 1033, Pars. 1 to 3.

Houston & T.C.R. Co. v. Gant, Tex. Civ. App., 175 S.W. 745.

Gulf States Utilities Co. v. Dillon, Tex. Civ. App., 112 S.W. (2d) 752, 753, Pars. 1 to 3, and authorities there cited.

Dallas Railway & Terminal Co. v. Boland, Tex. Civ. App., 53 S.W. (2d) 158, 160, Pars. 3 & 4, and authorities there cited.

II.

The statutes of the State of Idaho and the adjudicated cases do not allow recovery for grief and anguish of a parent for the wrongful death of a child.

Sec. 5-311 Idaho Code.

Sec. 5-310 Idaho Code.

Hepp v. Ader, 64 Ida. 240, 130 Pac. (2d) 859.

Wyland v. Twin Falls Canal Co., 48 Ida. 789, 285 Pac. 676.

III.

The verdict returned by the jury in the above case is excessive and excessive in an amount not allowed by law.

Hunten v. California-Portland Cement Co., 149 Pac. (2d) 471.

Zeller v. Reid, Calif., 101 Pac. (2d) 730.

Van Cleave v. Lynch, 166 Pac. (2d) 244.

Tyson v. Romey, 199 Pac. (2d) 721.

Amer. R. Co. of Porto Rico v. Santiago et al, 9 Fed (2d) 753.

The S. S. Black Gull - Faye v. Amer. Diamond Lines, Inc. et al, 90 Fed. (2d) 619.

IV.

The Trial Court in the District Court of the United

States, in and for the District of Idaho, Eastern Division, had power and authority to grant a new trial in this case.

Rule 59A of the Federal Rules of Civil Procedure for the District Courts of the United States.

Luther v. First Bank of Troy, 64 Ida. 416, 133 Pac. (2d) 717.

Maloney v. Winston Bros. Co., 18 Ida. 740, 111 Pac. 1080.

Roy v. Oregon Short Line R.R. Co., 55 Ida. 404, 42 Pac. (2d) 476.

The S. S. Black Gull - Faye v. Amer. Diamond Lines, Inc. et al, 90 Fed. (2d) 619.

V.

The Trial Court upon motion of the defendant should have made Ralph L. Bowman a party defendant in this suit. The motion was timely made and was proper under the circumstances.

Rule 19B of the Federal Rules of Civil Procedure for the District Courts of the United States.

Greenleaf v. Safeway Trails, Inc., 140 Fed. (2d) 889.

VI.

The trial Court had power and authority to reduce the verdict to an amount authorized by law.

Geist v. Moore, 58 Idaho 149; 70 Pac. (2d) 403.

Rice v. Union Pacific R. Co., 82 F. Supp. 1002.

VII.

This Court has power to either grant a new trial in this case or to reduce the verdict to an amount comensurate with the measure of damages provided for by law.

The S. S. Black Gull - Faye v. American Diamond Lines, Inc. et al., 90 Fed. (2d) 619.

Middleton v. Luckenbach S.S. Co., 70 Fed. (2d) 326.

United States et al. v. Boykin, 49 Fed. (2d) 762.

American R. Co. of Porto Rico v. Santiago et al., 9 Fed. (2d) 753.

Cain v. Southern Ry. Co., 199 Fed. 211.

ARGUMENT

I.

Did the trial court err in refusing to grant defendant's requested instruction that the jury did not have a right to consider as an element of damages, mental suffering and mental anguish of parents?

This case was tried before a jury in this District, and this appeal presents to this Court some very interesting and difficult questions. Before the jury was instructed the defendant in this case requested that the Court instruct the jury that in the event they found for the plaintiffs, in arriving at their damages they did not have a right to take into consideration the mental grief and anguish of the plaintiffs, parents of the little boy who was killed. The defendant requested

that the Court so instruct the jury, and the requested instruction is set out on page 150 of the Transcript and reads as follows:

> "You are instructed Ladies and Gentlemen of the Jury, that if you find the plaintiffs are entitled to recover you should not take into consideration the mental suffering and mental grief of the parents by reason of the death of Gary Checketts."

The requested instruction upon this subject was not given by the Court. We felt at the time of the trial and we feel now that the defendant in this action was entitled to the requested instruction. It is perfectly obvious from the statement of the case that it is a case in which a jury would be prone to allow as damages money to the parents for the grief and anguish they suffered by reason of their little boy's death. The rule in Idaho and in all other jurisdictions, where we have been able to find the rule clearly stated, is that in an action for wrongful death, grief and anguish of the parents is not a proper element of damages, and we have cited authorities for this statement in our Points and Authorities, Numbers I and II, and the rule anounced in Idaho is the rule generally. In this connection we take the position that not only are grief and anguish excluded as an element of damages in such a case, but in addition thereto the defendant was entitled to an instruction to this effect. We have heretofore cited several cases, Points and Authorities, No. I, which insofar as this point is concerned, appear to us to be controlling, and we desire at this time to quote from the case of American R. Co. of Porto Rico v. Santiago et al, 9 Fed. (2d) 753, wherein the Circuit Court of Appeals of the Second Circuit used the following language:

> "At a subsequent trial on the question of damages the jury should be instructed, among other things, that, in considering the pecuniary loss which the father has sustained, they may take into consideration the probable duration of life of the father and of the son, the prospective pecuniary benefits which the father might reasonably be expected to receive from the son during the full period of the expectancy of life common to both, including therein not only money contributions, but also such benefits as the father might derive from the personal attention, care, protection, and assistance that the son might bestow upon the father; that in awarding damages the jury should not take into consideration or award anything for the pain and suffering of the son, nor for the sorrow or grief of the father because of the son's death."

We desire likewise at this time to call this Court's attention to the fact that the Trial Court did instruct the jury upon the proper measure of damages in such cases but did not in said instruction, or in any other instruction, state what elements of damages could not properly be considered by them, (R. pp. 137 to 148). We further take the position that by instructing on the general measure of damages in such cases the Court, inferentially at least, conveyed to the jury the impression that other elements of damage, namely, grief and anguish, might be considered by them, those elements not being excluded. (R. pp. 146 and 147).

The true measure of damages in cases like the instant one under our statute, which statute is identical with the California and New York statutes, see Hepp v. Ader, 130 Pac. (2d) 859, is that such damages may be given as under the circumstances may be just. Construction of the statute,

however, has excluded therefrom damages for grief and anguish. See Hepp v. Ader 130 Pac. (2d) 859. The wrongful death statute was originally construed to mean that only pecuniary loss or damage could be compensated for, and that such pecuniary loss should be extended to and include all pecuniary loss of every kind, which the circumstances of the particular case establish with reasonable certainty. Any other or further allowance is beyond the purview of the statute and unjust to the defendant. See Hepp v. Ader 130 Pac. (2d) 859; Wyland v. Twin Falls Canal Co., 258 Pac. 676, and Points and Authorities No. 2.

II.

Did the court err in refusing to grant defendant's motion for new trial on the ground that damages were excessive?

Defendant in this case likewise contended earnestly that the verdict in this case was excessive and was excessive to such an extent and to such a degree that the very amount of the verdict indicated prejudice of the jury or bias as a matter of law, or the fact that the jury had considered matters as damages not proper for their consideration. A careful examination of the authorities, not only from Idaho but from other jurisdictions, indicates conclusively that Appellate Courts have not hesitated to grant new trials in such cases or to arbitrarily reduce the verdict to an amount commensurate with the measure of damages provided for by law. We have cited Hunton v. California-Portland Cement Co., 149 Pac. (2d) 471, a California case, in which a verdict of $40,000.00 was allowed by the jury for the death of a minor child. In

that case the California Court held, and we quote from that opinion:

> "In the instant case there can be no question that the allowance of $40,000.00 made by the jury was excessive, both as not supported by the evidence and as indicating passion or prejudice."

For the same holding we desire to particularly call the Court's attention to the case of Zeller v. Reed, Calif., 101 Pac. (2d) 730, wherein the same rule is announced and the same conclusion reached. (Points and Authorities No. III.)

At this time we desire to call this Court's attention to the fact that the California wrongful death statute is identical to the Idaho statute. Hence, the California authorities heretofore cited are strongly persuasive.
fore cited are strongly presuasive. See Hepp v. Ader, 130 Pac. (2d) 859.

We have examined the authorities from various jurisdictions, and we have found no cases in which a verdict or judgment of $35,000.00 has been upheld for the wrongful death of a small child approximately eight years of age, but that the authorities have, as nearly as we are able to ascertain, uniformly held that an award of such an amount indicates constructive bias or prejudice, or that the jury took into consideration matters and things that were not proper to consider in arriving at the verdict. As the Court knows there is no standard or basis for arriving at the damages that a parent suffers by reason of the death of a small child, and it is difficult or impossible to argue that a small child is not worth $35,000.00

to his parents. Hence, the only basis upon which we can arrive at what is the fair pecuniary reward for the wrongful death of a child is an examination of the statutes providing a measure for damages in such event and the cases from various jurisdictions construing the statute.

The authorities universally hold that where the amount of the verdict and judgment is not commensurate with the measure of damages provided for by statute, that then and in that event the verdict is excessive. The cases likewise hold that there must be some reasonable relation between the amount of the verdict and the measure of damages provided by law and must be tied directly to the pecuniary loss sustained by the parents. We submit, therefore, that under the authorities and under any reasonable view of the situation, there is no basis in law by which a verdict of $35,000.00 may be allowed for the death of a minor child eight years of age. (Points and Authorities No. III.)

We further take the position in this case that the Trial Court could have granted to us a new trial upon the ground that the verdict returned by the jury in the instant case was excessive, or that the Trial Court could have reduced the amount of the verdict. The law in Idaho with respect to this important matter is announced in the case of Luther v. First Bank of Troy, supra., wherein the following rule is announced:

> "While the amount of damages is peculiarly for the jury to determine under the facts of each particular case, this court can nevertheless determine whether or not the damages are so large as to indicate the in-

> fluence of passion and prejudice in the verdict. If the verdict is excessive but does not indicate such influence of passion and prejudice as to taint the entire verdict, that is, indicate that the rendering of any verdict against the defendant was because of passion and prejudice, merely that the verdict is excessive in amount, this court has reduced the amount, making its acceptance optional. (Maloney v. Winston Bros. Co., 18 Ida. 740, 111 Pac. 1080; Kinzell v. Chicago etc. Ry. Co., 33 Ida. 1, 190 Pac. 255; Roy v. Oregon Short Line R. R. Co., 55 Ida. 404, 42 Pac. (2d) 476). If, however, passion and prejudice evidently entered into the jury's deliberations not only as to the amount of the verdict but as to contributing to its returning any verdict at all, the verdict is vitiated and the only constitutional protection is to grant a new trial."

It does seem to us that the verdict in the instant case was so disproportionately high, considering the measure of damages provided for by law, that there is apparent in the verdict passion or prejudice, or both, and that there is truly reflected in the verdict an attempt on the part of the jury to invoke penal damages against the defendant, or damages in the way of penalty, the amount of the verdict being inconsistent with the measure of damages provided for by law. We submit that under the authorities it is not incumbent upon a defendant in such case to produce evidence or show that the jury was actually biased, but that the amount of the verdict itself conclusively indicates the existence of bias and prejudice, or both; Points and Authorities No. 3; and that it is proper for the Trial Court, or in this case this Court, to relieve the defendant from a judgment which is improper. For our present purposes we assume that the authorities are sufficiently clear, confer-

ring the right upon this Court to grant a new trial for excessiveness of damages, that we need argue it no further. Points and Authorities Nos. 6 and 7.

We feel that the verdict in this case is so excessive that we are entitled to a new trial, at which new trial we would be entitled to an instruction excluding from the jury's consideration the elements of anguish and grief suffered by the parents. If, however, this Court does not feel that under all of the circumstances we are entitled to a new trial, we submit that we are entitled to have the verdict of the jury reduced to an amount which is commensurate with the measure of damages provided for by law. Points and Authorities No. 6 and 7. It cannot be questioned that the trial court had power to effect such a reduction, or grant a new trial, and it is likewise fully within the power of this Court to adjust the damages to a figure that will reasonably correlate with those damages allowed by law under similar circumstances. Points and Authorities No. 6 and 7.

It cannot be questioned that the trial court had power to effect such a reduction, or grant a new trial, and it is likewise fully in the power of this Court to adjust the damages to a figure that will reasonably correlate with those damages allowed by law under similar circumstances.

III.

Did the Court err in refusing to grant defendant's motion to bring in as a party defendant Ralph L. Bowman?

Before the trial of this case the defendant filed a written

motion with the Trial Court, asking the Trial Court by order to bring into the case Ralph L. Bowman, who was the operator of the defendant's truck, but who was not made a party defendant by the plaintiffs. (R. pp. 12-13). We based our motion and right to have him made a party to the action by virtue of the provisions of Rule 19B of the Federal Rules of Civil Procedure fro the District Courts of the United States, which rule provides that upon motion any person may be made a party to an action, whose being a pary is necessary for a full determination of the controversy, or as more exactly stated by the rule, persons should be made parties, who ought to be parties if complete relief is to be accorded between those already parties. In this connection we desire to call the Court's attention to the fact that Ralph L. Bowman is a resident of the 90 and 91, and 121 to 137 of Transcript). He could have been made a party defendant to this suit without depriving this Court of jurisdiction, and, being the agent of the defendant corporation and the operator of the truck, was a proper party to a full determination of the case. Motion bringing him in as a party was properly made by the defendant, which motion was denied by the Trial Court.

Respectfully submitted,

O. R. BAUM
BEN PETERSON
DARWIN D. BROWN

Residence and Post Office Address:
Pocatello, Idaho.

No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS
husband and wife,

Appellees.

Brief of Appellees

Appeal from the United States District Court for the District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

B. W. Davis and L. F. Racine, Jr.,
Attorneys for Appellees
Pocatello, Idaho

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IV.

Appellant, in specification of error, No. 2, Page 8 of their Brief, admit that the instructions of the court as to the elements that could be considered by the jury in arriving at a verdict if they found for the

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VI.

The failure to negative or give instructions as to matters that may not be considered by the jury as elements of damage is not error where all of the elements of damage are properly set forth and this is especially true where the general charge does not, by its language, permit a jury to consider any elements except those covered by the instruction and where as here the jury was instructed: "Your verdict must be based on evidence admitted as presented from the witness stand." 8

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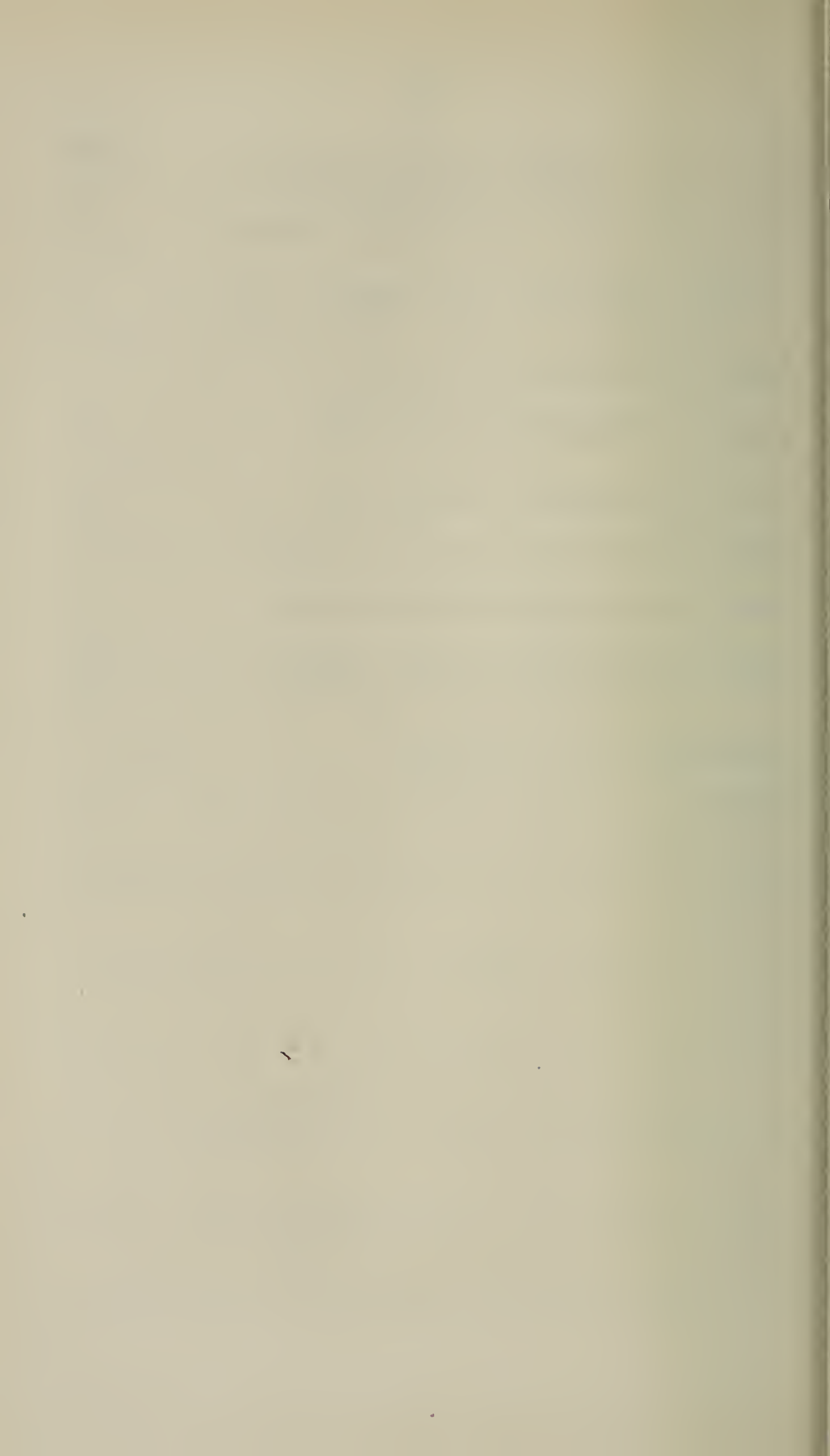

No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS
husband and wife,

Appellees.

Brief of Appellees

STATEMENT OF CASE

In addition to the statment of the case outlining the facts as set forth in appellant's brief (pp. 4 to 6) the testimony clearly shows a violation of Idaho Code Annotated, Section 48-1101:

> "It shall be unlawful for anyone to drive any motor vehicle past a truck, bus or other vehicle being used by a school district to transport children to or from school, at a time when anyone is getting on or off said truck, bus or other vehicle."

And that the appellant's driver was proceeding on a bright, sunshiny day with an unobstructed and clear view of the stopped school bus for at least half a mile. T 29-30

Also, that the driver, Ralph L. Bowman was driving an oil truck or tanker at a speed of from 35 to 50 miles per hour T. 30 T. 123 and that at the point on the highway where the accident occurred, the highway was widened on the easterly side thereof or on the right hand side of said truck driver's lane of traffic, and that there was a flat or level approach to the highway at what is nown as Merridell Park. T. 134.

Also, that there were at least some four automobiles or motor vehicles stopped directly behind the school bus waiting for the children to alight therefrom and that the oil truck driven by Ralph L. Bowman was the only motor vehicle approaching from the south at the time. T. 40.

The plaintiffs, Mr. and Mrs. Checketts were interrogated only as to their love and affection for their son, his comfort and companionship, the boy's nature, the fact that he was energetic and that it was expected by the parents that he would be of comfort and assistance to them. T. 99-103. Proof was submitted through the boy's school teacher in whose class he was enrolled at the time of his death, to the effect that he was a healthy, active boy, nicely behaved and intelligent. T. 80.

The school bus was plainly labeled with black letters on an orange background, and stated the name of the school district that operated the same. It was a large, orange colored bus, 7½ feet wide, 9½ feet in height and 32 feet in length. It was plainly labeled "School Bus" with the word "STOP" in large letters. T. 97-98

SUMMARY

The jury was selected by counsel for the respective parties after careful examination and the cause was tried and argued without any exception by either side as to the argument of counsel or as to the propriety of their conduct.

It was thoroughly understood and agreed in what amounted to practically a stipulation between counsel, that the jury was not entitled to permit their sympathy to in any way enter into the case and that the appellees were not entitled to any recovery for mental anguish, grief or suffering of the parents as the result of the loss of their child. Order denying motion for a new trial T. 22-23. By reason of the fact that there was complete accord between counsel for the respective parties as to the elements that the jury could properly consider, no record was made of this fact or of the voir dire examination, but as set forth in the court's order denying the motion for a new trial, counsel for the defendants repeatedly stated the correct rule of law to the jurors and they were advised that they could not consider mental anguish or grief, and this statement was acquiesced in and reiterated by counsel for the plaintiffs.

On page 4 of appellant's brief, under what is designated as Paragraph IV, mention is made of the fact that the defendant by its answer, pleaded that an action had been previously instituted in the State court and thereafter dismissed as to the Covey Gas and Oil Company. This answer, which was a seperate answer and defense, was the Sixth Defense of the appellant. T. 8-10. The appellees moved to strike

this defense, T.11, and the court T.12, struck the Sixth Affirmitive defense:

> "After hearing respective counsel, the motion as it pertains to the Fourth Affirmative Defense was overruled without prejudice, and granted as it pertains to the Sixth Defense."

No error is claimed as to this matter—it is not mentioned in either the appellant's Statement of Points, T.158-160, nor is it set forth in the appellant's Specifications of Error. Why it is referred to in the brief is not clear to counsel for appellees and apparently its only purpose could be to suggest to the appellate court that another action had been filed. However, in this connection, said Sixth Affirmative Defense, having been stricken by the trial court and no error having been predicated upon the trial court's ruling, we do not believe that any mention of it or of the pending action can be made. The facts concerning the other pending action are clear and undisputed and there could not be any disagreement as to those. We think that they militate strongly in appellees' favor here, but will not in any way refer to the same. If upon the oral argument of this matter before the appellate court, these matters are considered of importance, we will be glad to agree with counsel for appellant on the facts as to what has occurred.

The appellant's Specifications of Errors are found on pages 8 and 9 of their brief and are numbered from 1 to 8 inclusive. The specifications III, IV, V and VIII are based upon the proposition that the court erred in not granting a new

trial or reducing the amount of the verdict, and it is appellees' position that these Specifications cannot be considered by the appellate court.

Specification of Error No. VI is based on the proposition that the court erred in refusing to grant a new trial on the ground that the jury was not instructed, that they did not have the right to take into consideraion mental suffering and grief. The question of whether the jury was actually so instructed or actually so understood, was a question of fact in view of the examination of the jury and the statement of counsel, and being a question of fact, cannot be reviewed on appeal.

It is appellee's position that there is really only before the court, the question raised under Specification of Error No. VII, as to the bringing in of the defendant Ralph L. Bowman as a party.

Appellees take this position by reason of the fact that Specifications of Error I and II were submitted to the court on the motion for a new trial and that they are the same as the Specification of Error No. VI; each of these three Specifications complain that the jury should have been instructed, that they had no right to take into consideration mental suffering and grief. This matter having been submitted to the court in the motion for a new trial and the court in his order, having set forth what the facts actually were and that the jury was, as a matter of fact, advised by counsel for appellant that mental suffering and grief could not be considered—that this amounted to the same thing as the giving of the instruction and that the jury thoroughly understood the matter.

POINTS AND AUTHORITIES

I.

The rule of law as to the granting of a new trial, the amount of verdicts and excessive damages in the Federal Court is governed by the Federal Rules and decisions and not by the rules and decisions of the State Court.

Aetna Casualty & Surety Co. v. Yeatts, 4th Circuit, 122 Fed. 2d. 350.

Berry v. Edmunds, 116 U.S. 550, 29 L. Ed. 729.

Title Guarntee & Surety Co. et al v. State of Mo. ex rel. Stormfeltz, 105 Fed. 2d 496, Syllabus 8 and cases cited.

II.

28 U.S.C.A. Section 391 and cases cited thereunder.

Where the question of the excessiveness of a verdict is a matter of fact the appellate court cannot and will not consider whether a verdict is excessive or review the same where new trial denied.

Fairmount Glass Works v. Cub Fork Coal Co. 287 U.S. 474, 53 S. Ct. 254, 77 L. Ed. 439.

U.S. v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L.Ed. 1129.

Scott v. Baltimore & Ohio R. Co. 151 Fed. 2d 61, 3rd Circuit.

Ross Engineering Co. v. Pace, 153 Fed. 2d 35—4th Circuit.

Pocohontas Distilling Co. v. U.S. 218 Fed. 782.

Houston Coco Cola Bottling Co. v. Kelly, 5th Circuit, 131 Fed. 2d 627.

Cleveland Nehi Bottling Works v. Schenk, 56 Fed. 2d 941.

Aetna Casualty & Surety Co. v. Yeatts 122 Fed. 2d 350.

III.

Counsel for Appellees at all times understood and agreed, and now understand and agree that the appellees could not recover any amount by reason of their mental anguish and grief in the loss of their child and counsel were at all times, careful and painstaking in not either asking any question or making any argument that could in any way give the impression that they took any other position.

IV.

Appellant, in specification of error, No. 2, Page 8 of their Brief, admit that the instructions of the court as to the elements that could be considered by the jury in arriving at a verdict if they found for the plaintiffs were and are proper and correct and only contend that the element with reference to mental anguish and grief should have been excluded by a specific instruction.

V.

Appellees do not question the authority of the trial court in the Federal Court to grant a new trial or reduce an excessive verdict, if the same is justified and if there are any

circumstances or facts set forth showing misconduct on the part of the jury or a failure to follow the court's instructions.

VI.

The failure to negative or give instructions as to matters that may not be considered by the jury as elements of damage is not error where all of the elements of damage are properly set forth and this is especially true where the general charge does not, by its language, permit a jury to consider any elements except those covered by the instruction and where as here the jury was instructed:

> "Your verdict must be based on evidence admitted as presented from the witness stand." T 145.

Bolino v. Illinois Terminal R. Co. (Mo.) 200 S.W. 2d 352.

Jenkins v. Wabash R. Co. (Mo.) 107 S.W. 2d 204, Certiorari denied, 302 U.S. 737, 58 S. Ct. 139, 82 L. Ed. 570.

Mo. Pac. R. Co. v. Bushey (Ark.) 20 S.W. 2d 614, Cert. denied 50 S. Ct. 245, 281 U.S. 728, 74 L. Ed. 1145.

Byram v. East St. Louis R. Co. 39 S.W. 2d 376.

Humble Oil & Refining Co. v. Ooley (Tex) 46 S.W. 2d 1038, Syllibi 3 & 4.

Tibbels v. Chicago Great Western R. Co. (Mo.) 219 S.W. 109.

Nor. Pac. R. Co. v. Freeman et al, 83 Fed. 82, 9th Circuit.

Chicago & E.I.R. Co. v. Rains, (Ill.) 67 N. E. 840.

Webster Manufacturing Co. v. Mulvanny (Ill.) 48 N.E. 168.

Galveston H & S.A. R. Co. v. Heard et al (Tex) 91 S.W. 371.

Texarkana & Ft. S. R. Co. v. Frugia (Tex) 95 S.W. 563.

Houston & T.R. Co. v. Davenport (Tex.) 117 S. W. 790.

Griffith v. Midland Valley R. Co. (Kans) 166 Pac. 467.

Keast v. Santa Ysabel Gold Mining Co. (Cal.) 68 Pac. 771.

Gt. Western Coal & Coke Co. v. Coffman (Okla.) 143 Pac. 30.

Title 28 U.S.C.A. Section 2111, Chapter 139, Section 110 63 Stat. 105 (Printed at length on

Page 19 this brief.)

Rule 61, Fed. Rules of Civil Procedure (Printed at

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Section 5-907, Idaho Code (Printed—Page 19 this brief.)

Peterson v. Hailey Nat. Bank, 51 Ida. 427, 6 Pac. 2d. 145.

Hard v. Spokane Internat'l R. Co. 41 Ida. 285, 238 Pac. 891.

Bicandi et al. v. Boise-Payette Lumber Co. (Ida.) 44 Pac. 1103.

Park v. Johnson, 20 Ida. 548, 119 Pac. 52.

Austin v. Brown Brothers, 30 Ida. 167, 164 Pac. 95.

Tarr v. O.S.L.R.R. Co. 14 Ida. 192, 93 P. 957.

VII.

There was no error committed by the trial court in denying a motion to make Ralph L. Bowman a party thereto. The motion was dated and filed the first day of June, 1949, the date of the trial and the granting of the same would have resulted in a continuance.

Bull v. Santa Fe Trail Transportation Co., 6 F.R.D. 7

General Taxicab Association v. O'Shea (D.C.) 190 F.2d 671

ARGUMENT

GRANTING OF A NEW TRIAL AND THE AMOUNT OF VERDICT AND DAMAGES, ARE GOVERNED BY THE FEDERAL RULES AND PRACTICE.

The appellant necessarily proceeded under Rule 59 (a) of the Federal Rules of Civil Procedure when it asked the District Court to grant a new trial or to reduce the amount of

the verdict because it was excessive. The rule is well settled that the procedure in this respect is governed by the Rules of Civil Procedure and not subject in any way to the rules of state practice. Consequently, the Idaho cases cited in support of appellant's contention are not controlling or in point and this is likewise true as to California and other State court decisions concerning the amount of damages. In Etna Casualty & Surety Co. v. Yeatts, 4th Circuit, 122 F. 2d 350, the court said:

> "Motion to set aside the verdict and grant a new trial was a matter of Federal Procedure governed by Rule of Civil Procedure 59 and not subject in any way to the rules of State practice."
>
> "The motion for a new trial in the Federal Courts is addressed to the sound legal discretion of the trial judge and this proposition is universally recognized in the Federal Courts." Berry v. Edmonds, 116 U.S. 550, 29 L. Ed. 729

THE APPELLANT'S SPECIFICATIONS OF ERRORS III TO V INCLUSIVE AND SPECIFICATION NO. VIII, APPELLANT'S BRIEF, Pages 8 and 9, ARE NOT SUBJECT TO CONSIDERATION OR REVIEW BY THIS COURT. THESE SPECIFICATIONS REFER TO ERRORS IN DENYING A NEW TRIAL.

It is appellees' contention that in the instant case or in a case of like character where the question of the amount of damages and whether excessive or not, is one of fact and has been submitted to the trial court for review, that the appellate court cannot review the court's order.

In the instant case there is no question of impropriety of the jury, of counsel or of bias or prejudice committed.

> "In Fairmount Glass Works v. Coal Co. 287 U.S. 474, at page 481, 53 S. Ct. 252, 254, 77 L.Ed. 439, where inadequate damages were complained of, it was said, citing many cases: 'The rule that this court will not review the action of the federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.' "

In Houston Coco Cola Bottling Co. v. Kelly et al, 131 Fed. 2d 627, the court said:

> "* * a complaint of excessiveness in a verdict normally presents merely an error of fact and, therefore, nothing for appellate review. Southern Ry. Co. v. Walters, 8 Cir. 47 F. 2d 3. Said this court in Southern Ry. v. Montgomery, 5 Cir., 46 F.2d 990, 991: 'We have no jurisdiction to correct a verdict because it is excessive.' Cf. Swift & Co. v. Ellinor, 5 Cir. 101 F.2d 131. The duty of granting a new trial in a jury case for, or otherwise correcting, excessiveness in fact in a verdict, is exclusively that of the trial judge, and the granting or denial of a new trial on the ground of excessive damages is a matter of discretion with the trial court, not subject to review except for grave abuse of discretion. Department of Water & Power v. Anderson, 9 Cir., 95 F.2d 577; Natl. Surety Co. v. Jean, 6 Cir., 61 F. 2d 197; Chambers v. Skelly Oil Co., 10 Cir. 87 F.2d 853."

The above cases were approved by the U.S. Supreme Court in U.S. v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129.

In the case of Scott v. Baltimore & Ohio R. Co. 151 Fed. 2d 61, the court, in construing a very large verdict said:

> "The members of the court think the verdict is too high. But they also feel clear that there is nothing the court can do about it."
>
> "While as triers of fact we should be inclined, if we agreed with the plaintiffs' testimony, to award a smaller sum, we think to do so here would be to pass the point which we, with propriety may reach."

We fail to see how, in view of the express holding and direction of the U.S. Supreme Court and of the different Circuit Courts of Appeal the appellant can expect this court to consider its specification of error with reference to the denial of its motion for a new trial or the matter of the amount of the damages.

The appellant's specification of error No. 6 (Page 9 of appellant's brief) under the circumstances of this case is not reviewable here. The question of the instruction on mental suffering and mental grief was a question of fact for the reason that there was no reason or necessity for giving this instruction, as it clearly appeared as a matter of fact that the jury fully understood that no allowance could be made for anguish and grief. The court in the order denying the motion for a new trial, clearly sets out the facts and inasmuch as there is no disputt concerning the matter, the appellant cannot ask for a review on this appeal.

The jury was properly instructed in accordance with the Idaho Statute and the verdict of the jury cannot be set aside even though the appellate court should consider that question as being governed by the statute and the Supreme Court decisions of the State of Idaho.

Section 5-311, Idaho Code provides:

> "In every action * * such damages may be given as under all of the circumstances of the case may be just."

Not a single case can be found in the Idaho Supreme Court decisions where a verdict has been reduced for excessiveness by reason of the death of a child. The Idaho Supreme Court has held unqualifiedly:

> "Determination of damages for wrongtful death of a child are peculiarly for the jury." Asmundi v. Ferguson, 65 Pac. 2d 713.

> "Before a verdict can be set aside on the ground of excessive damages, appearing to have been given under the influence of passion or prejudice, such fact must be made clearly to appear to the trial judge." Short v. Boise Valley Traction Co. 38 Ida. 593, 225 P. 398, also Ellis v. Ashton & St. Anthony P. Co. 41 Ida. 106, 238 P. 517.

> "Jury should use common sense and discretion in estimating what the services of a child is worth, and in parents' action for death of adult daughter, jury must estimate damages as best they can by reasonable probabilities and circumstances." Golden v. Spokane R. Co. 118 P. 1076; Butler v. Townend (Ida.) 298 P. 375.

In Hepp v. Ader, 64 Ida. 240, 130 P. 2d. 859 cited by appellant, the court said:

> "There is probably no subject about which there is greater discord in judicial opinion than with respect to the amount which should be awarded as damages for the death of a human being, caused by the wrongful act or negligence of another. The right to recover such damages is statutory, and much of this discord may be attributed to differences in laws granting it."

And at Page 248 the court states:

> "Fixing amount of damages to be awarded, in a case involving death by wrongful act or negligence, is the duty and responsibility of the jury. The rule is too well established to require the citation of authority, that an appellate court should never interfere with the vedict of a jury because of the amount of the award, except in cases where abuse of discretion is clearly apparent. In this case we find no evidence of abuse of discretion, nor is there anything in the record which suggests that the verdicts were given under the influence of passion or prejudice."

THE JURY WAS PROPERLY INSTRUCTED AND IT WAS NOT ERROR TO REFUSE THE INSTRUCTION AS TO MENTAL ENGUISH AND GRIEF.

There is no controversy as to the different elements that may be considered by a jury in arriving at a verdict in a case of this kind. Counsel for Appellees had no objection to the giving of an instruction with reference to mental anguish or grief but the matter had been so thoroughly agreed upon by counsel that the trial judge undoubtedly realized that the statement of counsel to the jury by both sides, was much more

effective and impressive insofar as the jury was concerned, than the giving of an additional instruction purely as a precautionary measure and which would not have in any way tended to clarify the matter.

The case is not unlike that of Bolino v. Illinois Terminal R. Co. (Mo.) 200 S. W. 2d 352. The identical question before the court here on the instruction was raised in that case. The only difference is that the argument of counsel in the Missouri case was in the record and counsel for defendant had stated to the jury the elements that could not be included or considered by them. No objection was raised to his argument and the apellate court said:

> "The giving of the instruction by the court would have been no more than a precautionary one which was in the court's sound discretion."

In Griffith v. Midland R. Co. (Kans.) 166 Pac. 467, the court, during the course of the trial, limited the effect of certain testimony, or advised the jury that it could only be considered as affecting the creditability of the witness. The opposing counsel asked for an instruction to this effect. It was denied, and the Supreme Court in discussing the matter, said:

> "Such a ruling given at the time would be more likely to instruct the jury as to limited scope and purpose of the evidence than the instruction requested merely as one of the thirty separate instructions prepared by the defendant and handed up to the court when the evidence was concluded."

It is clear in the instant case that the instructions given, could not possibly be construed as authorizing recovery for

mental anguish and while the appellant takes the position in one of their specifications that the instrucions are subject to this criticism, they fail to point out how the instructions used could have in any way led the jury to believe that they were to consider mental anguish and the court did instruct the jury:

> "Your verdict must be based on evidence admitted as presented from the witness stand." T.145.

When counsel for the respective parties agree on a matter in the presence of the jury and it is thoroughly understood, there can be no reason or occasion for any further instruction.

While it would not have been improper and even proper for the court to give the instruction requested, the failure to give it where the jury was fully instructed is not error and the court is not obliged to instruct specifically on all matters that may not be considered by the jury.

In Great Western Coal & Coke Co. v. Coffman, (Okla.) 143 Pac. 30, the trial court instructed the jury generally that in fixing the damage or compensation that the plaintiff was entitled to by reason of a death, that they could take into consideration the life expectancy, the contribution and support that he might give to the plaintiff, the wife and the infant children of the parties. The defendant requested an instruction that the jury could not take into consideration any grief, mental suffering, companionship or society. This requested instruction was refused. The court in passing on the matter said:

> "The idea was excluded from their minds that they might take into consideration anything else and clearly confined her damages to the money value of the life of the deceased. For the reason that the court thereby excluded the consideration of any other element of damage and there was no evidence of, or recovery sought, for grief, mental suffering or loss of society, it was not error to give said instruction, or to refuse to give instruction No. 11 requested by defendant."

In Tiffels v. Chicago Great Western R. Co. (Mo.) 219 S. W. 109, it was said:

> "Instruction No. VI carefully limited plaintiff's compensatory damages to loss of support and ministration to her physical needs and necessary comforts. By necessary implication it excludes damages for loss of society and mental suffering. The jury will not be presumed to have violated the terms of the instruction but to have followed it, where there is nothing anywhere in the case countenancing any other element of damage. It is not like a case where the elements of plaintiff's damages are submitted in general terms."

Missouri Pac. R. Co. v. Bushey (Ark.) 20 S. W. 2d 614 is squarely in point. Cert. Denied, 50 S. Ct. 245, 281 U. S. 728, 74 L. Ed. 1145. The Ninth Circuit in Northern Pacific R. Co. v. Freeman et al, 83 Fed. 82, held squarely against the appellant's contention with reference to the instruction requested. That case was reversed by the U. S. Supreme Court, but upon the ground that the evidence showed the plaintiff to have been guilty of contributory negligence and the holding on this instruction by the Circuit Court of appeals was not passed upon.

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Section 2111, Title 28, U. S. Code, Chapter 139, Sec. 110, 63 Stat. 105.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, Rules of Civil Procedure.

"The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect." 5-907 Idaho Code.

It is not contended that there is any error of commission, but one of omission. This is not a case of a court having given an erroneous instruction and it must be clear from the record and the order of the trial court in denying a new trial, that the jury could only have reached its verdict upon the proper theory:

"Where jury reached verdict upon proper theory appellants held not prejudiced by improper instructions."
Peterson v. Hailey Nat. Bank, 51 Ida. 427, 6 Pac. 2d 145.

> "In this State a judgment will not be reversed where it appears that the jury took cognizance only of matters proper for their consideration even though erroneously instructed." Austin v. Brown Brothers, 30 Ida. 167, 164 P. 95.

The appellant cites and relies upon cases from the Texas courts and an analysis of the Texas cases can only result in a holding that they do not support appellant's contention. In the case of Gillett Motor Transport Co. v. Blair, (Tex.) 136 S.W. 2d, 656 appellant places reliance upon syllibi 3 and 5 but these clearly show that they are not applicable and the court in its discussion so indicates. The rule in Texas is that if the general charge is not subject to the construction that mental suffering and pain can be reasonably considered as matters that may be taken into consideration that it is not necessary to exclude them by specific instructions.

The leading Texas case requiring the giving of an instruction on matters to be excluded, is that of International and Great Northern R. Co. v. McVey, (Tex.) 87 S.W. 328. This case is analyzed and distinguished in both Galveston H. & S.A.R. Co. v. Heard et al (Tex.) 91 S.W. 371 and Texarkana and Ft. S.R. Co. v. Frugia (Tex.) 95 S.W. 563. The latter case is clearly in point in appellee's favor.

Appellant cites and relies on American R. Co. of Porto Rico v. Santigo et al, 9 F. 2d 753. This is the only Federal case cited in support of appellant's Specifications of Errors, I, II and VI, and under its Points and Authorities, found on Page 10 of the brief, and the decision does not support the assignment that it was error to not give the defendant's in-

struction as to pain and suffering. That point was not before the Circuit Court and the language with reference to mental anguish or pain and suffering is found in the language of the court in a suggestion as to the proper instruction to be given on a new trial. All that was held was that erroneous instructions were the law of the case insofar as the jury was concerned. There is not the slightest intimation in the decision that it would be erroneous to fully and properly instruct on the measure of damages as to the elements to be considered and to not instruct on those that were to be excluded or not considered.

Appellant also cites Humphrey v. Ash, 6 Atl. 2d 436. The court merely said the instruction should have been given, but the case was reversed because the general instructions did not state the proper rule with reference to damages and the facts are not applicable to the facts in the instant case. As heretofore referred to, all of the other cases cited in support of these Specifications of Error, are Texas cases.

IT WAS NOT ERROR TO DENY THE DEFENDANT'S MOTION TO MAKE RALPH L. BOWMAN A PARTY.

The motion to make Bowman a party, T. 12, was made solely upon the grounds that there could not be complete relief accorded between the parties to the action unless Bowman was made a party thereto. Inasmuch as appellant has not cited any Idaho authorities to the effect that there is any contribution between joint tort feasors; has not in any way

attempted to show any right of the defendant to contribution against Bowman, we take it that appellees are not under the burden of negativing this proposition.

However, there is no rule of law better settled than that there is no contribution between joint tort feasors, unless by statute, and certainly it is not contended by appellant that there is any contribution in Idaho as far as joint tort feasors are concerned, and certainly it is not and cannot be contended by the appellant that there is any rule of law better settled in Idaho than that a plaintiff may sue one or all joint tort feasors as the plaintiff elects.

In support of its assignment of error appellant cites one case that of Greenleaf v. Safeway Trails, 140 F. 2d 889. The decision as we read it, is squarely against the appellant's contention.

The case of General Taxicab Association v. O'Shea (D.C.) 190 F. 2d 671 lays down the rule. There are many decisions upon this proposition and it is well settled in tort actions that the defendant cannot compel the plaintiff to accept joint tort feasors as defendants unless the plaintiff is willing or so desires.

The plaintiffs' complaint was filed January 26, 1949 T. 5, and the answer was filed April 4, 1949, T. 10. The motion to bring Ralph L. Bowman into the case was made and filed June 1, 1949, was presented at the time the parties were ready for trial and the jury was to be called and immediately upon the denial of the motion, the court proceeded with the trial. T. 13.

The motion does not tender any complaint as to Bowman; does not ask that he be made either a party plaintiff or defendant and recites that it is based upon the records and files. The granting of the motion would clearly have continued the case for the term. There is no showing that the defendant contends or claims that Bowman is guilty of negligence or that there could be any contribution between the defendant and Bowman.

Surely error cannot be predicated upon a motion made and presented on the day set for trial and upon a motion that does not give any reason whatever why the plaintiffs could or should be forced to accept such a defendant.

CONCLUSION

The appellees proved the direct violation of the Idaho statute with reference to motor vehicles passing a school bus loading or unloading children. When the violation of this statute was proved, the defendant was negligent per se:

> "Any person or persons violating the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than $300 or imprisonment in the country jail for not more than six months." Section 48-1104 Idaho Code Annotated, 1932.

It was also proved that the school bus was plainly labeled with the number of the school district:

> "Every truck, bus or other vehicle, used by a school district to transport children to or from school, shall be labeled with the number of the school dis-

> trict by whose authority it is being used or employed at the time." Section 48-1102, Idaho Code Annotated, 1932.

The bus was 7½ feet wide, 9½ feet high, 32 feet in length. On the back it had the word "STOP" "SCHOOL BUS." On the side was written "INDEPENDENT SCHOOL DISTRICT NO. 1" in black letters. The bus was orange in color and was plainly marked "INDEPENDENT SCHOOL DISTRICT NO. 1", T. 97-98. It was shown by the testimony of the sheriff of Bannock County, Mr. Marley, that the school bus, when stopped at the place of the accident, could be plainly seen from a distance of 6/10ths of a mile. T. 87.

The evidence is undisputed that at the time of the accident, the driver, Ralph L. Bowman was driving in excess of 35 miles per hour and at that time, under the Idaho Statute, Section 48-504, Idaho Code Annotated, the same insofar as it was applicable, provided as follows:

> "Any person driving a vehicle on a highway, shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person.
>
> "* * It shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding 35 miles per hour. It shall be prima facie unlawful for any person to exceed the foregoing speed limitation."

The court gave the defendant the benefit of not instructing on this phase of the statute and plaintiffs were entitled to an instruction that a violation of the statute was prima facie negligence. Also, the driver, Ralph L. Bowman, having been assistant manager for the Covey Gas & Oil Co. T. 28, the plaintiffs were entitled to an instruction as to punitive damages. The defendant was also given the benefit of any doubt in this respect and the court refused to instruct as to punitive damages, and in its instructions, specifically limited the plaintiff to general damages and the amount prayed therefore in the complaint.

We refer to these matters for the purpose of showing that the defendant's rights were at all times carefully protected, not only by its counsel but by the court, and the appellant had a fair trial.

Certainly the killing of Gary Checketts occurred while the defendant's driver was in direct violation of the law as to stopping for a school bus, as to operating his automobile in a careful and prudent manner and as to exceeding the statutory speed at the time of the accident. (Certain additions and amendments having been made to the Idaho Motor Vehicle Act and with reference to school busses, we have referred to the Idaho Code Annotated to avoid any confusion.)

Certainly the actions of the driver were wanton, reckless and showed gross negligence and indifference on his part. The Idaho Supreme Court in Ellis v. Ashton & St. Anthony Power Co., 41 Ida. 106, 238 P. 517, without any claim for punitive damages, referred to the fact that the construction of the

pole line by the defendant in that case was wanton and careless and specifically held that this matter could be considered by the jury.

In this connection we call the court's attention to two Kentucky cases:

> "The final contention is that the verdict is not sustained by sufficient evidence, and is contrary to law. We do not so regard it. Statutes have been enacted in an effort to procure the prudent operation of automobiles. These statutes should be observed. When men are employed to operate automobiles, care should be exercised to select prudent and careful men, and, when men are employed who are not such, responsibility must follow." Dulaney et al v. Sebastian's Administrator, 39 S.W. 2d 1000.
>
> " 'it is only by imposing vicarious liability upon employers that such vigilance can be secured in the supervision of the men in their empolyment, as is needed, to protect others. It is only by such a rule that employers can be forced to weed out the reckless and the incompetent.' " Bowen v. Gradison Construction Co., 236 Ky. 270, 32 S.W. 2d 1014, 1019. The judgment is affirmed.

The legislature of the State of Idaho has attempted to protect school children who are under the necessity of riding to school in busses and who are required by law to attend the public schools. All of the other drivers of motor vehicles, of which there were at least some four or five, saw this large, brightly colored school bus and stopped. A state patrolman, or traffic officer was approaching the scene of the accident. He saw the bus from a distance of some half mile away; saw

the cars behind it and was approaching the bus from about th esame distance back of it as Bowman was approaching from the other direction, T. 68-69. This patrolman saw the blinker light on the back of the school bus, plainly blinking. T. 73. There is not the slightest hint or claim that any of the eye witnesses to this accident were other than disinterested.

In the examination of both Mr. and Mrs. Checketts, they were questioned only as to those matters that were proper. There was no objection made as to the propriety of the questions concerning the son's characteristics or as to the fact that he was energetic and that he was an affectionate child.

There was not a single objection interposed to any questions asked Mrs. Checketts, T. 101-104.

Surely the parents in this case should not be required to retry the same unless there is some substantial showing made that something grossly irregular or unfair occurred during the trial.

The foreman of the jury, Mr. Larsen was a man who had retired from the oil business and had formerly not only operated an oil truck or tanker on the road, but had been a distributor of petroleum products. He was a conservative man and a man of means. One of the jurors, Mr. Ray J. Eskelson the manager of a large department store in a group of chain stores. Mrs. Clara Jones was the wife of a prominent and well-to-do sheep man.

All of the jurors were substantial, conservative people and there is nothing in the record to show any irregularity of any kind.

It is argued that the case is one to excite the sympathy of a juror, and we say unhesitatingly that surely the case and the circumstances here excite the sympathy of any court and of counsel for both appellant and appellees, but certainly the plaintiffs are not to be deprived of a right to try their case because the actions of the defendant were wanton. Evidently the Legislature of the State of Idaho that adopted the statute with reference to school busses, was sympathetic to children and they did everything in their power to avoid just such an accident as occurred here.

If the jury system is to be maintained, by what logic can it be said that the jury can be instructed that they must base their verdict upon the evidence produced from the witness stand; that they can render a verdict in any amount they find just, not exceeding that prayed for in the complaint and after they have rendered their verdict on the evidence that the courts can and will say to them:

"Your verdict is not correct or is excessive," and that the court will base its judgment upon decisions of courts in other states and other cases when by so doing the court is accepting evidence not submitted to the jury. If the verdict of the jury is going to be changed in such a manner, then the jury should be advised by the court or evidence should be introduced showing what other courts have approved in like cases.

If the case were to be re-tried the same instructions would be given the jury and the court would not fix any ceiling upon the amount of their verdict except the amount prayed

for in the complaint. To follow such a rule is demoralizing to the jurors and they are not so uninformed or so naive as not to know the basis of the decisions when their verdicts are set aside. This sort of reasoning and procedure creeps into the jury room and jurors with experience argue pro and con, not what the evidence shows the damage to be and what is reasonable, but what amount an appellate court is likely to uphold and this is well known to the courts and the attorneys.

We submit that the verdict of the jury and the judgment entered thereon must be affirmed.

RESPECTFULLY SUBMITTED:

B. W. Davis

L. F. Racine, Jr.

Attorneys for Appellees,

Res., Pocatello, Idaho

No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation

Appellant.

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS,
husband and wife,

Appellees.

Reply Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

---

HONORABLE CHASE A. CLARK, *Judge*

O. R. Baum, Ben Peterson and Darwin D. Brown
Attorneys for Appellant
Pocatello, Idaho

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Attorneys for Appellant
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Appellees.

Reply Brief of Appellant

SUMMARY

Appellant herewith tenders Reply Brief to Brief of Appellees for the reason that appellant feels that there are many things in appellees' brief, as well as in the brief of appellant heretofore filed, that should be called to this Court's attention before the matter is submitted.

The questions to be presented and discussed in this Reply Brief are threefold:

I.

POINTS AND AUTHORITIES

Should this Court grant to the appellant a new trial because the verdict of the jury in the trial of the case was excessive?

The S. S. Black Gull—Faye v. American Diamond Lines, Inc. et al., 90 Fed. (2d) 619.

Middleton v. Luckenbach S. S. Co., 70 Fed. (2d) 326.

United States et al. v. Boykin, 49 Fed. (2d) 762.

American R. Co. of Porto Rico v. Santiago et al., 9 Fed. (2d) 753.

Cain v. Southern Ry. Co., 199 Fed. 211.

II.

Should this Court grant to the appellant a new trial because the Trial Court refused to instruct the jury at the trial of the cause that they, as jurors, did not have any right to take into consideration or make any allowance for the grief and mental anguish of the parents by reason of the death of their minor child?

American R. Co. of Porto Rico v. Santiago et al, 9 Fed. (2d) 753.

Humphreys v. Ash, 6 Atl. (2d) 436.

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Sec. 5-311 Idaho Code.

Sec. 5-310 Idaho Code.

Hepp v. Ader, 64 Ida. 240, 130 Pac. (2d) 859.

Wyland v. Twin Falls Canal Co., 48 Ida. 789, 285 Pac. 676.

III.

Should this Court, in the exercise of sound discretion, though refusing to grant appellant herein a new trial, reduce

the verdict of the jury to an amount commensurate with the measure of damages provided for by law?

> The S. S. Black Gull - Faye v. American Diamond Lines, Inc. et al., 90 Fed, (2d) 619.
>
> Middleton v. Luckenbach S. S. Co., 70 Fed. (2d) 326.
>
> United States et al. v. Boykin, 49 Fed. (2d) 762.
>
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>
> Cain v. Southern Ry Co., 199 Fed. 211.
>
> Hunten v. California-Portland Cement Co., 149 Pac. (2d) 471.
>
> Tyson v. Romey, 199 Pac. (2d) 721.

We feel that the other matters and things set up by the appellant as a basis of its appeal are amply and adequately covered by the original Brief and the appellees' reply thereto.

ARGUMENT

I.

SHOULD THIS COURT GRANT A NEW TRIAL BECAUSE THE VERDICT WAS EXCESSIVE AND IN AN AMOUNT NOT ALLOWABLE BY LAW?

Appellees' Brief cites and calls to this Court's attention a multitude of authorities under each of their various points

and authorities. Appellees take the position that the only basis upon which this Court can grant a new trial to appellant is on account of excessive damages and the Trial Court's failure to grant a new trial upon this ground is an abuse of discretion on the part of the Trial Court.

We have carefully examined appellees' authorities supporting this statement. Some of the authorities cited by appellees do so hold. We found, however, that such holding is academic and the rights of the parties are not determined by the announcement of the rule. The question in this case is not really whether Trial Court abused its discretion in not granting a new trial, the real underlying question is whether or not the Trial Court's refusal to grant a new trial in a case where the verdict was $35,000.00 for the death of an eight year old child is a denial of appellant's substantive rights and hence, within the wording of appellees' cases, an abuse of discretion. Appellees, and we have examined their cases rather carefully, cite no cases from any jurisdiction wherein a verdict of any sizable amount has been upheld, and by "sizable" in this connection we mean an amount even approximating $35,-000.00. Thus it seems to us that appellees in their brief have given this Court no assistance whatsoever in helping this Court determine whether or not the Trial Court's refusal to grant a new trial in the case of a verdict of $35,000.00 is an abuse of discretion.

In our original brief, among other cases, we called this Court's attention to the case of Hunten et al v. California-Portland Cement Co., 149 Pac. (2d) 471. This case is a California case, and we again want to call your attention to

the fact that the California wrongful death statute is identical with the wrongful death statute in Idaho, and by judicial construction the Idaho statute has been construed to include, in the event of a wrongful death, damages for loss of society and companionship as well as any anticipated actual pecuniary contributions during minority. See:

Hepp v. Ader, 64 Ida. 24; 130 Pac. (2d) 859.

The California statute for wrongful death being worded the same as the Idaho statute, see Hepp v. Ader, supra. The California statute has likewise been construed to include an allowance of damages for loss of comfort, society and protection, as well as reasonable expectation of actual pecuniary contributions during minority.

The Idaho Supreme Court, as near as we are able to ascertain, has not in any reported case held what damages under this statute are excessive, and verdicts of as high as $12,000.00 for the death of a minor have been upheld. Apparently no case has come to the Supreme Court of Idaho in which a verdict of an amount near $25,000.00 or $30,000.00 has been decided. California, on the other hand, in construing and applying an identical statute, has laid down in several of its reported cases, a clear and definite rule as to what damages may be allowed in such case.

We again desire to call this Court's attention to the case of Hunten v. California-Portland Cement Co., 149 Pac. (2d) 471. In that case a verdict was rendered by the jury for the death of a minor in the amount of $40,000.00. This verdict

was reduced by the Trial Court to $18,000.00, then the District Court of Appeals of the Fourth District of California held that in the case there was no evidence of pecuniary loss any greater than would be the case with the ordinary boy of that age, and an allowance of $3,000.00 to $4,000.00 for the service of the deceased during the remainder of his minority would have been liberal. The allowance for the value of his comfort, society and protection must bear a reasonable relation to such pecuniary loss as is shown by the evidence and could not be overly liberal, and the California Court held as follows:

> "Taking all these things into consideration we are of the opinion that the amount to which the verdict was reduced by the court is still excessive, and that the largest amount which could be held to find any support in the evidence is $10,000."

In the Hunten v. California-Portland Cement Co. case many other California cases are cited and discussed dealing with the identical subject. We earnestly call such cases to this Court's attention.

The amount of damages allowable, as set forth in the last mentioned case, may be considered modified by the case of Tyson v. Romey, et all, 199 Pac. (2d) 721, in which case, basing their opinion upon the same reason as the Hunten case, a verdict of $18,500.00 was allowed. This verdict had been reduced by the Trial Court from $25,000.00. This case does not change the rule of law nor the measure of damages announced or discussed in the Hunten v. California-Portland

Cement Co. case, supra, but does allow to stand a judgment in the amount of $18,500.00 for the death of the minor child.

II.

DID THE TRIAL COURT ERR IN REFUSING TO INSTRUCT THE JURY THAT THEY DID NOT HAVE A RIGHT TO TAKE INTO CONSIDERATION MENTAL GRIEF AND ANGUISH OF THE SURVIVING PARENTS?

There is a direct and positive connection between this question and the question discussed in the previous paragraph, that is, the verdict was excessive and apparently the jury made an allowance to the appellees for the anguish and the mental grief they suffered by reason of the wrongful death of their little boy, Gary. As clearly set forth in our original brief, we call this Court's attention to the fact that we had requested an instruction that the jury was not to consider these matters as an element of damages. This instruction the Trial Court refused to give. We thought that such an instruction was proper and right under the unusual and peculiar circumstances of the instant case. In an action upon a contract where business men are involved, or in almost any other type of litigation, it might be said that it would not be proper for the Court to exclude certain elements of damages from the jury, but in a case of the immediate type, it seems that it follows as the night the day, that when parents of a small boy appear in court and evidence grief and anguish

by reason of the death of their little child, that such feeling and such grief on the part of the parents will naturally be transmitted to the jury, and they in turn will feel the grief and anguish of the parents, and we do not believe it is unreasonable for us to assume that they made a substantial allowance therefor.

In our original brief we cited cases holding that in a case like the one at bar we were entitled to such an instruction, and we respectfully call your attention to cases cited in our original brief upon this question, under Points and Authorities No. I.

III.

IF THIS COURT DOES NOT FEEL A NEW TRIAL IS WARRANTED SHOULD IT REDUCE THE DAMAGES TO AN AMOUNT ALLOWABLE BY LAW?

We submit in support of our third point in this brief that should this court feel that the verdict is excessive, but that the entire judgment or verdict should not be lost by appellees, there being in this case no actual proof of evidence of bias or improper motives upon the part of the jury, except the excessiveness of the verdict, we feel that this Court can, under its powers, if it does deny to appellant a new trial, order a new trial in the event appellees refuse to accept a lesser sum, or a sum that, in the judgment of this Court, is proper and just under the circumstances of this particular case.

We therefore respectfully submit that our position in our original brief is correct and that we are entitled to the relief sought in this appeal.

O. R. BAUM

BEN PETERSON

DARWIN D. BROWN

Residence and Post Office Address:

Pocatello,, Idaho

No. 12400

In the United States Court of Appeals for the Ninth Circuit

Dwight H. Thomason, Francis E. Antilla, Clayton Brown, Benedict Klakowicz, and Howard Simon, plaintiffs-appellants,

v.

United States of America, defendant-appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

H. G. MORISON,
Assistant Attorney General.

KEITH R. FERGUSON,
LEAVENWORTH COLBY,
Special Assistants to the Attorney General.

FRANK J. HENNESSY,
United States Attorney.

C. ELMER COLLECT,
Assistant United States Attorney.

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In the United States Court of Appeals for the Ninth Circuit

No. 12400

Dwight H. Thomason, Francis E. Antilla, Clayton Brown, Benedict Klakowicz, and Howard Simon, plaintiffs-appellants,

v.

United States of America, defendant-appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court, Honorable Louis E. Goodman, United States District Judge (R. I: 32-34), is reported at 85 F. Supp. 742.

JURISDICTION

Appellants filed a civil action on October 22, 1947, asking recovery of additional compensation for official services as civilian seamen of the United States Army Transport Service during the period May 1944 to August 1945 (R. I: 1-20). The jurisdiction of the district court was invoked under the Tucker Act, former 28 U. S. C. 41 (20), now 28 U. S. C. 1346 (a).

The judgment of the district court dismissing appellants' complaint was entered August 15, 1949 (R. I: 34).

The notice of appeal was filed October 9, 1949 (R. I: 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATUTES, REGULATIONS AND DECISIONS INVOLVED

A. The pertinent jurisdictional provisions of the Public Vessels, Suits in Admiralty and Tucker Acts are reprinted in Appendix A, *infra*, pp. 48-49.

B. The pertinent statutes and regulations relating to appellants' appointment as officers of the United States are reprinted in Appendix B, *infra*, pp. 50-61.

C. The pertinent regulations relating to the appellants' right to overseas bonus and overtime are reprinted in Appendix C, *infra*, pp. 62-71.

D. The pertinent decisions of the Maritime War Emergency Board and the related correspondence are printed in Appendix D, *infra*, pp. 72-80.

E. The unreported decision on the merits in *Jentry* v. *United States*, (S. D. Calif.) is reprinted in Appendix E, *infra*, pp. 81-83.

F. Various unreported decisions relating to the exclusion of suits for compensation for official service from the Tucker Act jurisdiction of the district courts are reprinted in Appendix F, *infra*, pp. 84-97.

STATEMENT

This case was tried to the district court, Honorable Louis E. Goodman, sitting in admiralty. It was heard on the complaint and answer together with the testimony of appellant Thomason (R. II: 3-63) and the deposition of appellants' witness O'Connor which was received over the Government's objection (R. II: 28-29). The Government offered no testimony but filed copies of libelant Thomason's oath of office, application for appointment, report of termination and related documents and asked the court to take notice of the applicable regulations. Upon the conclusion of appellants' case at the trial, the Government renewed its motion to dismiss (R. I: 33). The district

court granted the motion and ordered the complaint dismissed both for absence of jurisdiction and for failure to state a cause of action (R. I: 32-34).

Appellants' complaint purports to invoke jurisdiction under the Tucker Act (R. I: 7). It alleges service on various government-operated vessels. It does not allege, however, whether these public vessels were "employed as merchant vessels" or exclusively as public vessels, which never at any time carried privately owned cargo or commercial passengers. Appellants' pleadings and proof alike contain nothing to negative jurisdiction under the Suits in Admiralty Act. On the other hand, jurisdiction under the Public Vessels and Suits in Admiralty Acts taken together is fully established by both pleading and proof.

Appellants' complaint as filed included six distinct claims: (1) area bonus at the rate of $5 per day (R. I: 2-3); (2) vessel attack bonus for each time their vessel was bombed (R. I: 5); (3) overtime pay for holiday work at the rate of 85 cents per hour (R. I: 3-4); (4) overtime pay for services in taking their vessels from the United States to the European Theater of Operations and from the theater back to the United States (R. I: 5); (5) payment in lieu of sick and annual leave not taken (R. I: 4); (6) refund of retirement deductions (R. I: 4, 6-7). During the course of the trial, however, it appears that all of the claims except those for area bonus and for holiday overtime were withdrawn. Thus it was conceded that appellants had not become entitled to vessel attack bonus (R. II: 62-63); that overtime compensation was not due under their contract for working to and from the European theater (R. II: 63); that appellant Thomason had received payment for his accrued annual leave (R. II: 52-53, 57); and that his retirement deductions had been refunded (R. II: 53).

The only issues left for decision of the court below were thus the question of jurisdiction and that of appellants' right to bonus and overtime. The pertinent facts of ap-

pellants' case on these issues can be easily summarized from the pleadings and the findings of the court.

Appellants were appointed by the Secretary of War pursuant to the Constitution and statutes (*infra,* pp. 50-52) to their several official positions as seamen of the United States Army Transport Service (R. I: 33). They accepted appointment and executed their required oaths of office as inferior officers of the United States serving in that establishment (R. I: 33). Like all government employees appointed for service overseas, they were also required to execute a supplemental overseas employment contract whereby they agreed further that, unless sooner relieved at the pleasure of the Government, they would serve "at any post of duty in the world, to be determined by the Government, * * * for a period of one year from the effective date of arrival" at their overseas posts of duty (R. I: 9).

Appellants entered upon the performance of duty pursuant to their several oaths of office on various dates during May and July 1944. They proceeded to the European Theater of Operations, as agreed in their overseas contracts. There they served on various Army tugs and related small craft, and on the expiration of their overseas contracts, returned to the United States on various dates in July and August 1945. Appellants were paid their official compensation as officers of the United States at the basic rates named in their overseas contracts together with the agreed one hundred percent overseas-bonus in lieu of all other bonuses. The applicable regulations (Appendix C, *infra,* pp. 62-71) did not authorize payments of area and attack bonus or overtime but provided that payment of base wages with one hundred percent overseas bonus was to be in lieu of all bonus, and that base pay had been fixed to cover expected overtime and compensatory time off at the convenience of the Government was to be given in lieu of all unexpected overtime.

Appellants accordingly were not paid any such additional sums for overtime or bonus. They made no protest

to the authority responsible for payment of their compensation, but merely advised the masters of their vessels of the extent of their overtime (R. II: 37-40).

In dismissing appellants' complaint for both want of jurisdiction and failure to state a cause of action, Judge Goodman stated (R. I: 33-34):

> It is not amiss to point out that Thomason, on the witness stand, before the introduction of the documents denied execution of the oath of office and application for civil service employment. But the documents admittedly demonstrate the incorrectness of his statement in that regard.
>
> The evidence fully proves that the plaintiff Thomasson was appointed by the head of a Department of the United States and was therefore an "officer of the United States." Consequently the Court does not have jurisdiction of this cause under the Tucker Act. See authorities cited in the Order Reserving Ruling, of October 22, 1948.
>
> I am further of the opinion that the Court does have jurisdiction of this cause under the Public Vessels Act. 46 USCA 781; Canadian Aviator, v. U.S. 324 U. S. 215; Amer. Stevedores, Inc., v. Porello, 330 U.S. 446; Loyola v. United States, (9th Cir.) 161 F. 2d 126; Jentry v. U.S. 73 F. Supp. 899.
>
> However it would be unavailing for plaintiffs to proceed under the Public Vessels Act inasmuch as the complaint having been filed more than two years after the claims arose, it is barred under the provisions of 46 USC 745. Kakara v. U.S. (9th Cir.) 157 F. 2d 578; Crescitelli v. U.S. (3d Cir.) 159 F. 2d 377; Piascik v. U.S. 65 F. Supp. 430.
>
> Furthermore, I am of the opinion, after examining the contract of employment, that it is plain and unambiguous. For the reasons stated by Judge Bondy in Henderson v. U.S. 74 F. Supp. 343, plaintiffs are not entitled, under the contract terms, to recover what they seek.

From this order of dismissal the present appeal was timely taken.

SUMMARY OF ARGUMENT

This case involves both a question as to appellants' right to invoke the jurisdiction of the district court and a question as to appellants' right to recover on the merits. In respect of the jurisdictional question, this is a companion to the case of *United States, Appellant,* v. *William P. Thornton,* No. 12428, now pending in this Court. In that case the district court, like the court below in the present case, followed established law and held exclusive jurisdiction of wage suits by civil-service employees of the United States, serving as seamen on its public vessels, was under the Public Vessels and Suits in Admiralty Acts. Appellants Thomason et al. in this case contend that there is no jurisdiction of such actions under the Public Vessels and Suits in Admiralty Acts. It is elementary that attorneys for the Government may not voluntarily consent to jurisdiction. We therefore felt compelled to appeal in the *Thornton* case, although the decision of the district court followed what we believe to be the correct rule.

Both district courts, correctly in our view, held that exclusive jurisdiction of suits for official compensation by civil-service employees of the United States, serving as seamen on public vessels, is under the Public Vessels and Suits in Admiralty Acts. We believe this result is required by prior decisions of this Court and of the Supreme Court. Appellants' present suit invoking jurisdiction under the Tucker Act was therefore correctly dismissed. It was filed after the expiration of the two-year statute of limitations of the Public Vessels and Suits in Admiralty Acts and could not be transferred to the admiralty docket. We further believe that the court below correctly held that appellants were "inferior officers" of the United States as a result of their appointment as regular civil-service employees. As such, they were prohibited from bringing this suit on the law side of the district court because of the exception from district court Tucker Act jurisdiction of suits by officers for official compensation.

I. The literal language of the Public Vessels Act as applied by decisions of this Court and the Supreme Court

fully establishes jurisdiction of seamen's suits for compensation of all kinds. *United States* v. *Loyola* (9th Cir.), 1947 A.M.C. 994, 161 F. 2d 126; *American Stevedores* v. *Porello,* 1947 A.M.C. 349, 330 U. S. 446; *Canadian Aviator, Inc.* v. *United States,* 1945 A.M.C. 265, 324 U. S. 215. This view is now supported by the decision of three district courts. *Jentry* v. *United States* (S.D. Calif.), 1948 A.M.C. 58, 73 F. Supp. 899; *Henderson* v. *United States* (S.D. N.Y.), 1947 A.M.C. 1371, 74 F. Supp. 343; and *Thomason et al.* v. *United States* (N.D. Calif. 1948), 85 F. Supp. 742. Jurisdiction of wage suits under the Suits in Admiralty Act has long been accepted. The same rule has been followed under the Public Vessels Act, which amended and supplemented the Suits in Admiralty Act. It is frequently impractical to determine whether a vessel is employed as a "merchant vessel" or employed exclusively as a "public vessel," it is neither just nor practical to make admiralty jurisdiction of wage suits depend on the accidents of operation. Recovery should be had in admiralty without proof as to whether the public vessel involved was or was not carrying some commercial cargo or passengers. This is particularly so since it is established by *Matson Navigation Co.* v. *United States,* 1932 A.M.C. 202, 284 U. S. 352, that where admiralty jurisdiction of a suit against the United States is available it is exclusive. Appellants demand that this Court reject this established jurisprudence. This comes with singular ill grace from them. The difficulty in which they find themselves is due solely to their failure to bring suit within the two-year limitation period. Yet they do not even offer any excuse for their laches.

II. Appellants ask this Court to overrule its prior decision and the decisions of other courts which have established the meaning of the exception from the Tucker Act jurisdiction of the district court of suits for official compensation. See *Oswald* v. *United States* (9th Cir., 1938), 96 F. 2d 10; *United States* v. *McCrory* (5th Cir., 1899), 91 Fed. 295; *Callahan* v. *United States* (D.C. Cir., 1941), 122 F. 2d 216. Those decisions establish that regular civil-service employees, such as appellants, are "inferior officers" of the United States. They are appointed by authority of the head

of their department; they execute the required oath of office; they make the required affidavit that they have not paid for their appointments as officers of the United States.

The rule established by the decisions accords with the legislative history of the exception from district court Tucker Act jurisdiction of suits for official compensation. As enacted in 1887, the Tucker Act contained no such exception from district court jurisdiction. In 1898, however, because of the tremendous flood of suits for overtime by letter carriers and navy yard mechanics as a result of the eight-hour laws enacted in 1888 and 1892, Congress determined to concentrate in the Court of Claims all suits for salaries, overtime and fees. It amended the Tucker Act so as to withdraw such cases from district court jurisdiction. Congress reenacted the exception in 1911 and 1948 without substantially changing the language.

It is familiar that the same word may be used with different meanings in different acts and even in different parts of the same act. This has been particularly true with the word "officer." Thus the Supreme Court held that a navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat,* (1888) 124 U. S. 303), but, in a decision handed down the same day, it also held that such a clerk was an "officer" for the different purposes of a different statute (*United States* v. *Hendee,* (1888) 124 U. S. 309). See also *Steele* v. *United States No. 2,* (1925) 267 U. S. 505. Reenactment confers Congressional sanction that the courts' interpretation of the term "officer" in the Tucker Act exception was correct. Appellants particularly should not be heard to question the established interpretation. They did not have to sue in the Court of Claims, but could within two years have maintained their suit in the district court in admiralty under the Public Vessels and Suits in Admiralty Acts. Their own laches is the sole cause of their difficulty.

III. Appellants were paid compensation on a different basis than that of seamen serving on different vessels not operated by the Army. Their base wage was higher and they received a 100 percent continuous overseas bonus.

Bonus was paid regardless of whether their vessels were in drydock or in a safe port instead of on the high seas subject to enemy attack. This was contrary to other seamen who were paid bonus only when exposed to enemy attack at sea. Having first obtained the advantage of their higher rate of basic compensation and of the continuous payment of overseas bonus not available to other seamen, appellants now seek also to obtain bonus and overtime paid to other seamen employed on a different and lower basis of compensation. Their supplemental overseas contracts foresaw the possibility of just such controversies. Their contracts accordingly made express provision that the higher rate of pay and the 100 percent overseas bonus should be in lieu of all other rights.

Appellants contend the court below was mistaken in holding their overseas contracts unambiguous. If this Court should agree with appellants and hold that the contract is ambiguous, it may take judicial notice of applicable regulations which show conclusively that the district court's interpretation of the contract was correct. We have printed these regulations in the appendix and we discuss them in detail in our argument.

We believe that the court below correctly dismissed appellants' suit both for want of jurisdiction and on the merits. We submit that this Court should therefore affirm.

ARGUMENT

I

The Settled Practice, the Controlling Cases, and the Clear Language of the Public Vessels Act Establish That Appellants' Remedy in Admiralty Was Exclusive and Required the District Court to Dismiss Appellants' Attempted Tucker Act Suit

Appellants failed to follow the established practice and bring suit in admiralty for their wages as civil-service seamen of the United States within the two-year limitation of the Public Vessels and Suits in Admiralty Acts, 46 U. S. Code 782, 743. After the expiration of the two-year limitation, they brought this suit under the Tucker

Act, seeking the advantage of its six-year limitation. The court below dismissed.

Appellants now ask this Court to overturn the settled practice, overrule its prior cases and permit their tardy recovery under the Tucker Act. We believe that the public interest in simplification of litigating procedures requires adherence to the settled cases and the established practice. This is particularly true here since appellants have neither justification for their laches nor any merit to their claim.

A. *Under the practice established by the controlling decisions of this and other courts it is immaterial to legal rights whether the public vessels involved are employed as merchant vessels or as exclusively public vessels.*

To understand appellants' contention, the vessel operating practices of the United States must be understood. Public vessels of the United States manned by civil-service masters and crews are employed according to need in two different types of operation. Some are "employed as merchant vessels"; others "as exclusively public vessels." Public vessels are said to be "employed as merchant vessels" when they are employed to carry commercial cargo and passengers for hire. This is especially frequent in time of war or other national emergency. But in time of peace, when private shipping cannot profitably serve certain of our outlying possessions, public vessels are often used and they are then "employed as merchant vessels." Public vessels are said to be employed "as exclusively public vessels" when they are employed to carry only public cargoes and passengers. Common types of exclusively public employment are hospital ships, army transports and army harbor and sea-going tugs—so long as their use is confined to exclusively public purposes.

To decide when a public vessel is "employed as a merchant vessel" and when "employed exclusively as a public vessel" is frequently impossible. Exclusive public employment is not the rule. Army and navy transports both in war and peace frequently carry commercial cargo and passengers. See 10 U. S. Code 1367, 1368, 1371. The question

is one of degree. True, it is most often done to aid a contractor doing government work or a commercial air line maintaining island service bases. It is none the less a commercial operation and if enlarged to some extent, the transport ceases to be employed for exclusively public purposes. It must then be deemed to be "employed as a merchant vessel." So with the ten or a dozen United States Army Transports currently engaged on their return voyages in bringing refugees to this country for the International Refugee Organization. There seems little doubt that the courts would hold they are public vessels but "employed as merchant vessels."

Congress has passed two complementary jurisdictional statutes providing for admiralty suits against the United States. The Suits in Admiralty Act, 1920, 46 U. S. Code 741 *et seq.*, applies whenever the public vessel involved is "employed as a merchant vessel." The later statute, the Public Vessels Act, 1925, 46 U. S. Code 781 *et seq.*, which supplements and amends the earlier statute, was designed to fill the gap left by the 1920 statute's restriction of jurisdiction only to such cases where the public vessel was "employed as a merchant vessel." The 1925 Act grants jurisdiction for the bringing of any libel "for damages" arising out of government vessel operations and applies even when the public vessel involved was "employed exclusively as a public vessel." Together these complementary statutes provide the exclusive remedy against the United States in the admiralty and maritime field.

At this late date we do not believe any doubt as to the exclusive character of the admiralty jurisdiction statutes can exist. In *Matson Navigation Co.* v. *United States,* 1932 A. M. C. 202, 284 U. S. 352, 356, following *Johnson* v. *United States Fleet Corp.,* 1930 A. M. C. 1, 280 U. S. 320, 357, and *United States Fleet Corp.* v. *Rosenberg Bros.,* 1928 A. M. C. 441, the Supreme Court decided that the Suits in Admiralty Act was exclusive and prevented all Tucker Act jurisdiction not only in the district court but also in the Court of Claims. See also *Sanday & Co.* v. *United States,* 1933 A.M.C. 61, 76 Ct. Cls. 370.

As the Suits in Admiralty Act, standing alone, applies only in cases where the public vessels were "employed as merchant vessels," the Supreme Court left unanswered, the question whether the amendment effected by the Public Vessels Act made suit in admiralty the exclusive remedy where the public vessel involved was not "employed as a merchant vessel" but as an exclusively public vessel. But the court below and every other court which has ever considered the matter has recognized that the Supreme Court's reasoning inescapably applies to both of the complementary statutes. If it did not, the result would not only be that the statute of limitations for suits against the United States would differ according to the chance of how its public vessels were employed. The limitation period imposed by the Public Vessels and Suits in Admiralty Acts would become a mere *brutem fulmen.* The limitation would be subject to be changed from two years to six whenever the claimant might wish to have it so. He need only claim jurisdiction under the Tucker Act. See *Federal Sugar Refining Co.* v. *United States,* (2d Cir.) 1929 A. M. C. 84, 30 F. 2d 254, reversed, for failure to dismiss for want of jurisdiction, *sub nom. Johnson* v. *United States Fleet Corp., supra.*

Because of the practical difficulty in telling which of the two complementary admiralty suits statutes applies, it has long been the practice of prudent admiralty counsel to allege that the district court has jurisdiction "pursuant to the Public Vessels and Suits in Admiralty Acts, 46 U. S. Code 781 *et seq.,* 741 *et seq.*" or, even more often, "pursuant to the Suits in Admiralty Act and all acts amendatory thereof or supplemental thereto (46 U. S. Code 740-790)." And, if only one of the two acts is invoked, libelants are ordinarily allowed freely to amend to invoke the other. See e. g., *Jentry* v. *United States,* (S. D. Calif.) 1948 A. M. C. 58, 73 F. Supp. 899. In this way hundreds of suits, including many for seamen's wages, proceed to judgment each year without it ever being determined whether jurisdiction is founded particularly on the one or the other, or on both, of the two complementary admiralty jurisdiction statutes. Courts and government counsel alike have not until

appellants' present contention seen much reason for attempting to distinguish.

Relying upon the statute's literal language and the decisions of this Court in *United States* v. *Loyola,* (9th Cir.) 1947 A. M. C. 994, 161 F. 2d 126, 127, and *O. F. Nelson & Co.* v. *United States,* (9th Cir.) 1945 A. M. C. 1161, 149 F. 2d 692, 698, as well as of the Supreme Court and other courts of appeals in *Canadian Aviator, Inc.* v. *United States,* 1945 A. M. C. 265, 324 U. S. 215, 228; *American Stevedores* v. *Porello,* 1947 A. M. C. 349, 330 U. S. 446, 450, and *United States* v. *Caffey,* (2d Cir.) 1944 A. M. C. 439, 141 F. 2d 69, 70, cert. den. 319 U. S. 730, many civil-service seamen (not only of the Army Transport Service but of the numerous other government agencies employing public vessels of the United States exclusively as public vessels and not as merchant vessels) have brought and maintained their suits for wages under the Public Vessels and Suits in Admiralty Acts.

Civil-service seamen seeking recovery for services on public vessels which are employed as merchant vessels have never been denied the seaman's traditional remedy by suit in admiralty to recover for wages as well as for maintenance and cure. Jurisdiction of such suits is founded on the Suits in Admiralty Act with its two-year statute of limitations (46 U. S. Code 743). Civil-service seamen such as appellants here, serving on public vessels, such as hospital ships, army transports, coastal survey vessels and harbor and river patrol craft of all services, when employed exclusively as public vessels, have heretofore equally enjoyed the same remedy under the amendments effected by the Public Vessels Act and with the same two-year limitation (46 U. S. Code 782, 743).

Always heretofore it has been regarded as inequitable in the highest degree to reject the literal language of the Public Vessels Act and this Court's previous views. No attempt has been made to distinguish between the rights of civil-service seamen serving on public vessels according as their vessels were employed solely as public vessels or employed as "merchant vessels" by reason of carrying some

commercial cargo or passengers for hire. See *Jentry* v. *United States,* (S. D. Calif.) 1948 A. M. C. 58, 73 F. Supp. 899, 902. Seamen's rights, no more than the rights of shippers or injured shoreworkers, ought not to depend upon its intricacies. The distinction, we have seen, is most often one of quantity and degree and is largely accidental. Cf. *The Western Maid,* (1922) 257 U. S. 419; *James Shewan & Sons, Inc.* v. *United States,* (1924) 266 U. S. 108; *The Lake Lida,* (4th Cir., 1923) 290 Fed. 178; *O. F. Nelson & Co.* v. *United States, supra.*

B. *This Court should reject appellants' demand that the controlling cases be overruled and the question of limitations and jurisdiction be made henceforth to turn upon the type of service in which public vessels are employed*

Appellants' basic contention on this appeal is that this Court should overturn the previously established practice in admiralty suits against the United States. Appellants ask that all prior decisions be overruled and that this Court hold the questions of jurisdiction and statute of limitations applicable to suits for wages by civil-service seamen of the United States should henceforth depend upon whether the public vessels on which they have served happen to have been "employed as merchant vessels" or were employed exclusively in public functions.

If the public vessels ever chanced to be "employed as merchant vessels," such as is the case if they carry any commercial cargo or passengers, or if they were operated by the War Shipping Administration, so that the Clarification Act (50 U. S. Code Appx. 1291) applies, then, appellants apparently agree that their civil-service crew members must file suit in admiralty within the two-year statute of limitations applicable to admiralty suits against the United States. But if by chance the vessels are never "employed as merchant vessels," but exclusively as public vessels, then, say appellants, their civil-service crew members can disregard the two-year limitation and file suit at law within the

six-year statute of limitations applicable to Tucker Act suits against the United States.

We believe appellants' argument requires too much. Their own pleadings do not meet their need. If they are to be entitled to sue under the Tucker Act on their theory, they must allege and prove that their vessels were never at any time employed as merchant vessels, but always exclusively as public vessels. If their vessels ever during their service carried commercial cargo or passengers, the Suits in Admiralty Act is their exclusive remedy. It is elementary that the allegation and proof of jurisdiction is on the party suing the United States. Tucker Act pleadings must be dismissed unless they plainly negative jurisdiction under the admiralty suit statutes. *Matson Nav. Co.* v. *United States,* (1932) 284 U. S. 352, 359. Government officers may not concede the jurisdictional facts nor consent to the court's exercise of jurisdiction. Under appellants' theory the point becomes important and it is for them to establish. They failed to do so and their suit was correctly dismissed.

Appellants' contention for unequal treatment of civil-service seamen of public vessels according to the use the Government chances to make of their vessel is made solely in order to relieve appellants of their own laches. It is to permit appellants in this particular case, who neglected to file timely suit within the two-year statute of limitations provided by the Public Vessels and Suits in Admiralty Acts (46 U. S. Code 782, 743), to now bring this suit within the six-year limitation of the Tucker Act (28 U. S. Code 2401 (a), former 28 U. S. Code 41 (20)). For this purpose alone appellants seek to overturn the established practice and decisions.

The court below refused appellants' inequitable demand to disregard the prior decisions, which have held that civil-service seamen serving on public vessels can bring suits for wages only in admiralty and within two years as provided by the Public Vessels and Suits in Admiralty Acts. Instead the court below, correctly in our view, followed established decisions of this and other courts and the literal language of the statute. It held that the district court has

jurisdiction exclusively under the Public Vessels and Suits in Admiralty Acts and is given no jurisdiction of appellants' suit under the Tucker Act.

Never, we have seen, until appellants' contention in the present suit, has this exclusive jurisdiction of seamen's wage suits been questioned in any appellate court. Civil-service seamen of the United States, serving on public operated vessels, have the seamen's traditional right to sue their government employer for wages in admiralty and jurisdiction therefore is founded on the Public Vessels and Suits in Admiralty Acts. And this whether the vessels chance to be employed as "merchant vessels" in commercial carriage or employed as "exclusively public vessels" in military and lend-lease carriage.

The Public Vessels Act (46 U. S. Code 781) in pertinent part provides:

> A libel in personam in admiralty may be brought against the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.

And it is elementary that a libel *for damages* is all inclusive, for "damages" is the compensation awarded for breach of any obligation, whether sounding in contract or tort.

The literal language of the statute as followed by this Court's decision in *United States* v. *Loyola,* 1947 A.M.C. 994, 161 F. 2d 126, by the decision of Judge Mathes in *Jentry* v. *United States,* (S.D. Calif.) 1948 A.M.C. 58, 73 F. Supp. 899, and that of Judge Goodman in the court below, *Thomason* v. *United States,* (N.D. Calif.) 85 F. Supp. 742, are fully dispositive of the question of the district court's jurisdiction in this present case. The statutory language confirms that claims "for damages" through breach of contract as well as tort are included, for it expressly provides (46 U. S. Code 782) that no interest shall be allowed prior to judgment except "upon a contract expressly stipulating for payment of interest."

It is familiar that a suit for money *damages* is the only remedy against itself to which the United States has ever

consented. Thus the Tucker Act authorizes suits "*for damages* in cases not sounding in tort" (28 U. S. Code 1346 (a-2)). Indeed, it has been long settled. "Damages consist in compensation for loss sustained * * * By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." See *The Steel Trader,* 1928 A.M.C. 162, 275 U. S. 388, 391, quoting Sedgwick's *Damages.* The Public Vessels Act, just like the Tucker Act, permits the bringing of suits "for damages" for breach of contract. But unlike the Tucker Act it is not confined to "cases not sounding in tort." The Public Vessels Act, complementing the Suits in Admiralty Act, authorizes libels "for damages" in tort and contract alike. Thus the Supreme Court in *American Stevedores* v. *Porello,* 1947 A.M.C. 349, 330 U. S. 446, 450, fn. 6, called particular attention to the fact that the statute used the word *damages* "which means a compensation in money for loss or damage."

In *Canadian Aviator* v. *United States,* 1945 A.M.C. 265, 324 U. S. 215, 228, the court had previously expressly declared, "We hold that the Public Vessels Act was intended to impose on the United States the same liability * * * as was imposed by the admiralty law on the private shipowner." It thus covers suits "for damages" caused by breach of the vessel's contract to employ appellants. The fact that appellants' alleged damages were caused by the breach of their contracts of employment by persons acting for the public vessel, rather than by the vessel itself as a noxious instrument, involves nothing more than the traditional admiralty personification of the vessel. Indeed, the Supreme Court in the *Canadian Aviator* case declared that in using such language Congress had merely adopted "the customary legal terminology of the admiralty law," which refers to the vessel as causing every act which her personnel do in her behalf. "Such personification of the vessel," said the Court, "treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she

is legally responsible, has long been recognized by this Court.'' So in *Porello,* as we have seen, the Court likewise emphasized that in providing for suit ''for damages'' Congress undoubtedly had firmly in mind the distinction between ''damage,'' meaning merely the actual loss or injury inflicted, and its plural ''damages,'' meaning the compensation awarded in money for the loss or damage however caused to the libelant by the public vessel or those acting for her.

If there lingers in the Congressional language of the Public Vessels Act something of the flavor of tort, we need not be surprised. Nor is it controlling. Breach of contract has been held actionable under the Tort Claims Act as well as the Public Vessels Act. *United States* v. *Scrinopskie* (5th Cir., 1950), 179 F. 2d 959, 960. At the common law it is familiar that the action for breach of a simple contract was in *assumpsit,* a writ framed on the case after those sounding in tort for trespass or deceit. Ames, *History of Assumpsit,* 3 Select Essays on Anglo-American Legal History 259. In admiralty, the distinction between tort and contract was unknown until relatively late.

Considerations of practical convenience particularly demand equality of treatment of all litigants, including civil-service seamen serving on government vessels, whether the vessels are employed by the Government as ''merchant vessels'' or exclusively as public vessels. The rule of strict construction of statutes permitting suit against the sovereign should not be employed to create arbitrary distinctions, serving only to frustrate honest litigants, nor to make cases turn on the accidents of the Government's vessel operations. Courts should not be unmindful of the rule that, ''The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.'' *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 53-54. But as the Supreme Court itself there noted, ''When authority to sue is given that authority is liberally construed to accomplish its purpose.'' See also *United States* v. *Shaw,* 309 U. S.

495, 501; *New England Maritime Co.* v. *United States* (D. Mass.), 1932 A.M.C. 323, 55 F. 2d 674, 685, aff'd without opinion 73 F. 2d 1016; cf. *Canadian Aviator, Ltd.* v. *United States, supra,* 324 U. S. at 222. So Judge Cardozo, in *Anderson* v. *Hayes Const. Co.* (1926), 243 N. Y. 140, 147, 153 N.E. 28, 29, observed, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The established practice should continue to be followed. This Court should reaffirm its prior decisions, and uphold the action of the court below. We submit, that this Court should reject appellants' demand that it be assumed, contrary to the rule of the *Matson* case, *supra,* 284 U. S. at 359, that the public vessels on which they served were not employed as merchant vessels but as exclusively public vessels. Appellants should not be permitted to maintain suit under the Tucker Act after the expiration of the prescribed time to bring their suit under the Suits in Admiralty Act, as supplemented and amended by the Public Vessels Act.

II

The Decisions Establish That Appellants, as Regular Civil-Service Employees Appointed by the Secretary of War and Executing the Required Oaths of Office, Are Officers of the United States Prohibited from Maintaining District Court Tucker Act Suits for Compensation for Official Services

This Court in *Oswald* v. *United States,* (9th Cir. 1938) 96 F. 2d 10, as has every other court which has ever considered the question, held that all regular civil-service employees of the United States appointed by the head of their department and executing the required oath of office are "inferior officers" within the meaning of the Constitution and the meaning of the exception to district court jurisdiction found in the Tucker Act. To permit appellants, after the expiration of the two-year jurisdictional limitation of the Public Vessels and Suits in Admiralty Acts, to maintain this suit under the Tucker Act, appellants ask that these prior decisions be overruled.

The burden of establishing the facts and law to found any such additional jurisdiction was on appellants. We believe that appellants' laches bars them at the threshold, but that in any event the established course of decision, the history, and the plain language of the Tucker Act exception are all conclusive that their claims are excluded and their action was correctly dismissed by the court below.

A. *Appellants Alone Bear the Burden of Establishing Their Right to Proceed under the Tucker Act in Addition to the Admiralty Suit Acts and their Laches in Filing Suit Bars Their Suit.*

In considering appellants' claim to Tucker Act jurisdiction of a suit for compensation for official services, we start, as Judge Rifkind said in *Surowitz* v. *United States,* (S. D. N. Y., 1948) 80 F. Supp. 716, 718, "with the proposition it is the plaintiff's burden to establish the court's jurisdiction." And, as the Court of Claims in *Sanguinetti* v. *United States,* (1920) 55 Ct. Cls. 107, 133, affirmed 264 U. S. 146, declared:

> There are no presumptions to be indulged in favor of jurisdiction, it cannot be assumed if it does not in fact exist, it cannot be conferred by consent of parties, it must affirmatively appear, and it is a question for strict construction.

See also *United States* v. *Sherwood,* (1941) 312 U. S. 584, 590; *Eastern Transp. Co.* v. *United States,* 1927 A.M.C. 174, 272 U. S. 675, 686.

"The right of the plaintiff to recover is a purely statutory right" and jurisdiction, said the Supreme Court in *Price* v. *United States,* (1899) 174 U. S. 373, 375, "cannot be enlarged by implication." "It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed," the court continued, "we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume." (As was said in *United States* v. *Michel,* (1931) 282 U. S. 656, 659, another case where the claimants, like appellants here, had slept while their rights became time barred, "Suit may not be maintained against the

United States in any case not clearly within the terms of the statute by which it consents to be sued.''

Appellants thus must first sustain the burden, which we emphasized in Point I, (*supra*, pp. 11-15), of persuading this Court that they cannot maintain their claims under the two complementary admiralty suit acts. Next, appellants must bear the burden of persuading this Court that, although appointed by the Secretary of War and executing the required oath of office, they are not inferior officers of the United States and are not forbidden to sue under the Tucker Act. But at the very outset, we submit, appellants must first satisfy this Court of their standing even to raise the issue of any alleged right to avail themselves of such additional Tucker Act jurisdiction. We believe under established Tucker Act decisions they are barred by their laches from invoking that jurisdiction.

Appellants' laches in waiting three years to file suit bars them at the threshold from coming into court by the Tucker Act. The Tucker Act has a six-year jurisdictional limitation statute. Decisions of the Supreme Court and the Court of Claims, however, bar any resort to the courts unless proper protest is promptly made and suit brought forthwith. *Norris* v. *United States,* (1921) 257 U. S. 77, 80, following *Nicholas* v. *United States,* (1921) 257 U. S. 71, 75, held fatal a delay of even eleven months in filing suit for compensation. In *Swisher* v. *United States,* (1922) 57 Ct. Cls. 123, 138, recovery was rejected for even six months delay in bringing suit for overtime. Immediate protest to the authority paying the compensation followed by prompt suit is indispensible. *United States* v. *Garlinger,* (1898) 169 U. S. 316, 322; *United States* v. *Martin,* (1876) 94 U. S. 400, 404.

If appellants had filed suit well within the two-year jurisdictional limitation period of the Public Vessels and Suits in Admiralty Act, they could not have maintained an action. They would be barred from the courts by laches unless they had protested to the authority responsible for denying them payment and then sued at once. The decided cases require government wage claimants, such as appel-

lants to make immediate protest to the authority which prescribed the regulations prohibiting payment of additional bonus and overtime. Prompt suit must follow immediate protest. This appellants failed to do. Appellants not only waited three years and did not sue promptly, but they made no protest. All the record shows was a report of overtime to the masters of their vessels (R. II:37-40). Yet they knew full well that the master was bound by the regulations and a protest to him was of no effect. They knew likewise that he was not the man that paid them. The *Garlinger* and *Swisher* cases clearly bar appellants.

We therefore believe that appellants have no standing even to undertake the heavy burden of establishing that they can maintain this suit under the Tucker Act in place of the government seaman's traditional remedy under the Public Vessels and Suits in Admiralty Acts.

B. *The Settled Course of Tucker Act Decisions Establishes that Every Regular Civil-Service Employee Appointed by Authority of the Head of His Department and Executing the Required Oath of Office is an Officer of the United States.*

In *Oswald* v. *United States,* (9th Cir., 1938) 96 F. 2d 10, this Court expressly held that civil service employees, such as appellants, are "inferior officers" of the United States who are excluded from maintaining Tucker Act suits for official compensation in the district court but must sue in the Court of Claims. The first question for decision, this Court said is (96 F. 2d at 13).

> Was the plaintiff an officer of the United States? "The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Const. art. 2, § 2, cl. 2. * * * "If an official has been appointed in any of the modes indicated in the

> paragraph of the federal Constitution above quoted, he is an officer of the United States.'' Scully v. United States, C. C. Nev., 193 F. 185, 187. See, also, Burnap v. U. S., 252 U. S. 512, 516, 40 S. Ct. 374, 376, 64 L. Ed. 692; United States v. Mouat, 124 U. S. 303, 307, 8 S. Ct. 505, 31 L. Ed. 463; United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482; United States v. Hartwell, 73 U. S. 385, 393, 6 Wall. 385, 393, 18 L. Ed. 830; United States v. McCrory, 5 Cir., 91 F. 295, 296. We conclude, therefore, that the appellant was, or is, an ''officer'' of the United States.

Equally dispositive of appellants' attempt is the holding of the Fifth Circuit in *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295, the first appellate case to arise under the exception.

The exception was enacted by Congress pursuant to the recommendation of the Attorney General. Its purpose was to exclude from the district court jurisdiction the flood of overtime suits by letter carriers and navy yard mechanics (*infra,* pp. 32-34). Not unnaturally, the first case involved a letter carrier, McCrory, who, like appellants here, contended that his employment was not sufficiently important to make him an officer. The Fifth Circuit held appointment by authority of plaintiff's department head and the taking of an oath of office were controlling, not the importance of the position. The court said (91 Fed. at 296):

> It is argued that letter carriers are not officers of the United States, within the meaning of the statute in question, but are mere employes, not intended to be included in the statute. Letter carriers are appointed by the postmaster general under authority of the acts of congress, practically during good behavior. They are sworn and give bond for the faithful performance of their duties. They are paid from moneys appropriated for the purpose by congress, and their salaries are fixed by law. They have regularly prescribed services to perform, and their duties are continuing and permanent, not occasional or temporary. In U. S. v. Hartwell, 6 Wall. 385, 393, the supreme court declared that ''an 'office' is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and

> duties." In U. S. v. Germaine, 99 U. S. 508; Hall v. Wisconsin, 103 U. S. 5, 8; U. S. v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449; U. S. v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505; U. S. v. Smith, 124 U. S. 525, 8 Sup. Ct. 595; and in Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. 103,—U. S. v. Hartwell, supra, is cited with approval. An examination of these cases, all bearing on the question in hand, will show that, in the opinion of the supreme court, where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such person is an officer of the United States; and that, within the constitutional meaning of the term. Letter carriers, therefore, are officers, within the meaning of the above-quoted statute, restricting the jurisdiction of the circuit and district courts in regard to suits brought against the United States under the act of 1887.

Accord: *Kennedy* v. *United States,* (5th Cir., 1944) 146 F. 2d 26, 29 (Army mathematics instructor).

Other Courts of Appeals have followed this contemporaneous construction of the exception under the Tucker Act for the same reasons. *Callahan* v. *United States,* (D. C. Cir., 1941) 122 F. 2d 216, 218 (customs employee); *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295, 296 (letter carrier); *Borak* v. *Biddle,* (D. C. Cir., 1944) 141 F. 2d 278, 281 (Justice Department attorney). Cf. *McGrath* v. *United States,* (2d Cir., 1921) 275 Fed. 294, 300-301;

Appellants' brief seems to imply that Army Transport seamen lack that amount of dignity, importance and compensation which they think necessary to make them "inferior officers" of the United States (Br. 11). But the decisions have established that in a democracy, official status does not depend on such factors. As the court observed in *Brown* v. *United States,* (E. D. Ark., 1949) *infra,* Appendix F, pp. 84, 85, 87:

> Neither the importance of the task, the amount of compensation, nor the duties to be performed is determinative of whether the employee of the government is an "officer" within this exception in the Tucker Act. Surowitz v. United States, 80 Fed. Supp.

718, note 2. In Burnap v. United States, 252 U. S. 512, 516, the Supreme Court said: "The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the services to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. (Citing cases)"

* * * * *

The claims of the plaintiffs are of the character of claims dealt with by the Tucker Act of March 3, 1887, 28 U. S. C. 1346 (2), and would be maintainable in the district courts, if Congress had not seen fit to expressly withhold consent to sue the government on such claims. This exception, if applicable, is applicable to every grade of employee, and as the court must hold these plaintiffs to be officers of the United States within the exception, the exception will apply to them. United States v. Hartwell, supra; Kennedy v. United States, supra.

It should not be forgotten that the purpose of the Tucker Act exception was to put an end to district court suits for overtime by letter carriers and navy yard mechanics (*infra*, pp. 32-34). The employees in the *Brown* case were of far less importance than appellants and that case should be conclusive. Certain it is that the positions of most of the inferior officers of the United States to whom courts have denied the right to sue under the Tucker Act are of far less dignity and importance than those of appellants. See *United States* v. *McCrory*, (5th Cir., 1899) 91 Fed. 295, 296 (letter carrier); *Foshay* v. *United States*, (S. D. N. Y., 1931) 54 F. 2d 668, 669 (postal clerk); *Oswald* v. *United States*, (9th Cir., 1938) 96 F. 2d 10 (court reporter); *Callahan* v. *United States*, (D. C. Cir., 1941) 122 F. 2d 216, 218 (customs employee); *Borak* v. *Biddle*, (D. C. Cir., 1944) 141 F. 2d 278, 281 (Justice Department attorney); *Kennedy* v. *United States*, (5th Cir., 1944) 146 F. 2d 26, 27 (Army mathematics instructor); *Baskins* v. *United States*, (E. D. S. C., 1940) 32 F. Supp. 518, 519 (penal guard); *Hen-*

derson v. *United States,* (S. D. N. Y., 1947) 74 F. Supp. 343, *Jentry* v. *United States,* (S. D. Calif., 1947) 73 F. Supp. 899, 901 and *Thomason* v. *United States,* (N. D. Calif., 1949) 85 F. Supp. 742 (Army Transport seamen); *Surowitz* v. *United States,* (S. D. N. Y., 1948) 80 F. Supp. 716 (Army attorney); *Brown* v. *United States,* (E. D. Ark., 1949) Appendix F, *infra,* p. 84 (Army Air Force employees); *Bolin* v. *United States,* (W. D. N. Y., 1949) Appendix F, *infra,* p. 88, and *Winsberg* v. *United States,* (S. D. Calif., 1949) Appendix F, *infra,* p. 96 (Veterans Administration physicians); *Owens* v. *United States,* (M. D. Ala., 1945) Appendix F, *infra,* p. 95 (Army fire-fighters).

In view of the purpose of the Tucker Act exception to deal particularly with overtime claims of letter carriers and navy yard mechanics it is natural that only six cases have ever reached a contrary result in the entire fifty-two years of litigation. All turn on their special facts and all but one are reported. *Scully* v. *United States,* (C. C. Nev., 1910) 193 Fed. 185 (deputy appointed by surveyor); *United States* v. *Swift,* (1st Cir., 1905) 139 Fed. 225 (bailiff appointed by marshal); *Cain* v. *United States,* (N. D. Ill., 1947) 73 F. Supp. 1019, further proceedings 77 F. Supp. 505 (secretary appointed by individual judge); *Ducey* v. *United States,* (D. Minn., 1945) unreported (physician appointed by Veterans Administrator); *Morrison* v. *United States,* (S. D. N. Y., 1930) 40 F. 2d 286, and *Brooks* v. *United States,* (E. D. N. Y., 1939) 33 F. Supp. 68 (naval petty officers not appointed but "rated" from enlisted ranks by their immediate commanders).[1] We believe the grounds of decision of these contrary cases only

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[1] The case of *Walsh* v. *United States,* (E.D. Pa., 1947) 72 F. Supp. 441, involving Army firefighters, was only on a preliminary motion and is not pertinent. It turned solely on the state of the record at the time of the motion. The Government had made certain concessions and there was nothing before the court to show the method of plaintiff's appointment. On a fuller record a contrary result was reached as to the same category of employees in *Owens* v. *United States,* (M.D. Ala., 1945) *infra,* Appendix F, p. 95. It is perhaps significant that the *Walsh* case has never been brought to trial.

serve to confirm that appellants cannot sue under the Tucker Act.

In *Scully* the court emphasized that appointment by authority of a department head is necessary to constitute an employee an officer; Scully was a contract surveyor employed by one of the local surveyors general of the General Land Office (193 Fed. 186, 188). In *Swift* the court pointed out that "bailiffs are never sworn in accordance with the statute, and are not 'officers of the United States' " but only of the court (139 Fed. at 227).[2] In *Cain* the secretary was employed by the particular judge, not appointed by the court, nor by the Director of the Administrative Office of United States Courts. (See 28 U. S. Code 712 and 752 and revisors' notes as to prior statutes.) Appointment by the court or the department head is necessary for an "officer." The decision emphasized (73 F. Supp. at 1019) her employment was the act of only the particular judge who selected her.

It should be remembered that there are quite a few such irregular government "employees." Not only are they not inferior officers of the United States, as are regular civil-service employees, such as appellants here; it may be doubted that they are employees of the United States at all, even though they may ultimately be paid from government funds. Cf. *Dismuke* v. *United States,* (1936) 297 U. S. 167, 173.[3]

Ducey's case turned on the contention that the head of the Veterans Administration was not the head of a department. Because it involved only $60 and was not re-

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[2] Cf. *Collins* v. *Mayor,* (1875) 3 Hun. (N.Y.) 680, 681: "Probably the true test to distinguish officers from simple servants or employees, is in the obligation to take an oath."

[3] Such irregular employees, employed outside the regular civil service by individual government officers, either as their personal assistants or for intermittent service, although often of great dignity, have always been held not to be "inferior officers" of government but at most mere employees. *United States* v. *Germaine,* (1878) 99 U.S. 508, 511; *United States* v. *Smith,* (1888) 124 U.S. 525; *Auffmordt* v. *Hedden,* (1890) 137 U.S. 310, 326; *Burnap* v. *United States,* (1920) 252 U.S. 512.

ported, we took no appeal. The case is discussed and a contrary decision reached in *Bolin* v. *United States,* (W. D. N. Y., 1949) *infra,* Appendix F, pp. 88, 92. See also *United States* v. *Marcus,* (3d Cir., 1948) 166 F. 2d 497, 503. The cases of *Morrison* and *Brooks* we believe to have been wrongly decided. In the first case, Morrison was concededly entitled to recover, while the record on the jurisdictional point was clearly insufficiently made. In the *Brooks* case, where a better record was made, the decision was for the Government on the merits. In neither case was appeal practical.

In the face of the statutes, the regulations and the personnel file placed in evidence with the district court, appellants cannot deny that they were appointed by authority of the Secretary of War. Nor can they deny that they executed the required oath of office and the required affidavit that they had not made any payment to obtain appointment. These are requirements which apply by their terms to "officers" (5 U. S. Code 16 and 21a) and appellants' compliance is significant. Under the overwhelming weight of decision, such appointment and execution of an oath constituted appellants "officers." Appellants doubtless recognize the weakness of any reliance on the small contrary minority of cases involving special circumstances. At any rate, appellants' chief reliance is not on those cases but on an attempt to distinguish their present case on two grounds: (1) that, despite 5 U. S. Code 43 (*infra,* Appendix B, p. 50) and *United States* v. *Hartwell,* (1867) 6 Wall. 385, 393, only department heads, acting in their proper person, may appoint and they may not delegate their power of appointment, and (2) that the execution of the supplemental overseas employment contract, pursuant to 50 U. S. Code Appx. 763 (*infra,* Appendix B, p. 50), is incompatible with "officer" status.

Appellants appear to argue that because the Secretary of War did not personally sign their letters of appointment and personally administer their oaths of office they are not "inferior officers" of the United States (Br. 9, 12). This Court in the *Oswald* case and the Fifth Circuit in the *Kennedy* case *supra,* both held that *approval*

by the Assistant to the Attorney General was sufficient. Every decided case under the Tucker Act has upheld such appointments as sufficient although the department head has acted by approval or delegation as authorized by 5 U. S. Code 43 (*infra,* Appendix B, p. 50). *Brown* v. *United States,* (W. D. Ark., 1949) *infra,* Appendix F, pp. 84, 86; *Surowitz* v. *United States, supra,* 80 F. Supp. at 719; *United States* v. *Hartwell,* (1867) 6 Wall. 385, 393; *Kennedy* v. *United States, supra,* 146 F. 2d at 28; *M'Grath* v. *United States,* (2d Cir., 1921) 275 Fed. at 301; *Henderson* v. *United States,* (S. D. N. Y., 1947) 74 F. Supp. 343, 344. Indeed, it may be doubted that few if any of the "inferior officers" whose appointment is vested by Congress in the department heads and whose suits for official compensation have been litigated were ever appointed by the department head acting in his proper person. See *United States* v. *Marcus,* (3d Cir., 1948) 166 F. 2d 497, 503, semble that statutory authority in the department head to appoint will be taken to assume there was appointment or at least approval by him.

Appellants (Br. 10) also make much of the fact that in accordance with established procedure under 50 U. S. Code Appx. 763, (*infra,* Appendix B, p. 50), they were required to execute supplemental overseas employment contracts, binding themselves to serve overseas for at least one year. "A special contract with an officer," say appellants, "would be an anomaly." But appellants view is directly contrary to the famous dictum of Chief Justice Marshall that there might be a "contract to perform the duties of the office". *United States* v. *Maurice,* (C. C. Va., 1823) 26 Fed. Cas. No. 15, 747 at p. 1214. This exact question, moreover, was decided the other way by Judge Rifkind. He held that execution of overseas employment contracts did not affect the officer status of civil service employees. That decision was in connection with a similar contract involved in a suit by a shoreside employee of the Army in *Surowitz* v. *United States,* (S. D. N. Y., 1948) 80 F. Supp. 716, 719. Judge Rifkind said:

> * * * It would appear, therefore, that because in the instant case the plaintiff was appointed by the Secretary of War exercising his authority through a subordinate official to whom he had delegated his authority

> and because the appointment was made pursuant to a statute creating the position or office which the plaintiff filled, he is an officer.
>
> The question remaining is whether such a conclusion is inconsistent with the admitted allegation that the plaintiff was employed pursuant to a contract of employment. There is language in United States v. Hartwell, 1867, 6 Wall. 385, 393, 18 L. Ed. 830, which distinguishes appointments to office from contracts of employment; but, as I read that language, it does not mean that there is a necessary inconsistency between the two conceptions in every case. Neither of the parties has submitted a copy of the alleged contract. It is a fair inference, however, that by his contract the plaintiff agreed to hold his post for a period of one year, a provision which the government may have regarded as useful in the light of the fact that it was going to transport the plaintiff overseas and back at considerable expense. In any event, I see no logical reason for asserting that there is an inevitable incompatibility between appointment to an office and the exchange of promises relating to the terms and conditions under which the office is to be performed. See Hall v. Wisconsin, 1880, 103 U. S. 5, 10, 26 L. Ed. 302.
>
> My conclusion is that the plaintiff was an officer of the United States. The United States District Court is, therefore, without jurisdiction to hear his claim for salary or compensation.

Judge Bondy also reached that result in respect of the similar overseas contracts of Army Transport seamen. See *Henderson* v. *United States,* (S.D. N.Y., 1947) 74 F. Supp. 343, 344.

We believe therefore that, by the overwhelming weight of the decided cases, appellants as civil-service employees appointed by and with the approval of their department head and executing the required oath of office are inferior officers prohibited from suing under the Tucker Act. We submit this Court should summarily reject appellants' demand that the settled case law should be overruled in order to allow the tardy maintenance of their suit for seamen's wages.

C. *The Legislative History and Purpose of the Exception of Suits for Official Compensation from District Court Tucker Act Jurisdiction Confirms Its Application to All Regular Civil-service Employees such as Appellants.*

The established judicial construction of the Tucker Act exception as prohibiting suit by any regular civil-service employee, appointed by authority of the head of his department and executing the required oath of office, has been given Congressional sanction by the repeated reenactment of the clause without substantial change. Such reenactment has been repeatedly held to signify Congressional approval. *Lang* v. *Commissioner,* (1938) 304 U. S. 264, 270; *Helvering* v. *R. J. Reynolds Tobacco Co.,* (1939) 306 U. S. 110, 115; *Helvering* v. *Bliss,* (1934) 293 U. S. 144, 151. It confirms the purpose of the exception as originally enacted to correct the confusion and conflicts created by district court decisions as to the overtime compensation and fees of government employees.

For most purposes, every person in the federal civil service appointed by the President or by or on behalf of a department head is an "officer." *Hoeppel* v. *United States,* (D.C. Cir., 1936) 85 F. 2d 237, 240-242, cert. den. 299 U. S. 557; *Towle* v. *Ross,* (D. Ore., 1940) 32 F. Supp. 125, 127; 16 Ops. A. G. 113. Strict construction of criminal statutes has often led to a different result, because of contrast with criminal enactments expressly covering employees and agents. Such cases should be disregarded in construing the Tucker Act exception in the face of its history and the substantial judicial unanimity as to its liberal construction to forbid district court suits.

In this connection, it is appropriate to note that it is not unusual for the same words to be used with different meanings in different acts, and even in different parts of the same act. *Atlantic Cleaners & Dyers* v. *United States,* (1932) 286 U. S. 427, 433. Cf. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *Dickerson,* 310 U. S. 554, 561. This is especially true in legislation affecting government personnel. *Morgenthau* v. *Barrett,* (D.C. Cir., 1939) 108 F.

2d 481, 483. Thus, the Supreme Court held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat,* (1888) 124 U. S. 303), but, in a decision handed down the same day, equally held that such a clerk was an "officer" for the different purposes of a different statute (*United States* v. *Hendee,* (1888) 124 U. S. 309). Such results, far from being inconsistent, simply effectuate the different legislative intent underlying each use of "officer" in the statutes. *Steele* v. *United States No. 2,* (1925) 267 U. S. 505.

The exception of suits for official compensation was an amendment added to the Tucker Act in 1898 because of the difficulties created by district court jurisdiction over claims of government employees for overtime compensation and fees. As originally enacted, Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, contained no exception of suits for official compensation. Prior to the amendment effected by the Act of June 27, 1898, c. 503, 30 Stat. 495, such suits by government workers for compensation could be freely maintained. *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295. Overtime pay suits, filed by letter carriers and navy yard mechanics as a result of the Act of May 24, 1888, c. 308, 25 Stat. 157, and the Act of August 1, 1892, c. 352, 27 Stat. 340, soon became a problem. The Reports of the Attorney General clearly disclose the situation. The fiscal year 1894 saw 37 district court letter carrier overtime cases disposed of, but 1,025 individual judgments had to be entered in the 37 cases (Ann. Rep. A. G., 1894, p. 10). In fiscal 1895, of the total of 48 new suits filed in the district courts under the Tucker Act, 15 were suits for mechanics' overtime, the number of individuals suing not being specified (*Ibid.,* 1895, p. 41). In fiscal 1897, of 47 new suits 19 were for letter carriers' overtime, the number of individuals suing again left unspecified (*Ibid.,* 1897, p. 5).

Repeated recommendations were made for concentrating such litigation as to Government employees compensation in the Court of Claims (E.g. *ibid.,* 1894, p. 10, 1897, p. 7). Thus in 1895 the Attorney General reported: "I recommend that claims of United States officers or employees for compensation, expenses, or fees be excluded from the jurisdiction of the circuit and district courts"

(*Ibid.,* 1895, p. 15). As a result of Congressional enactment of the recommended legislation in 1898, however, it was reported in 1900 that the total of all new Tucker Act suits outside the Court of Claims had been reduced to 18; the reduction being attributed to the exclusion of suits for compensation by government employees (*Ibid.,* 1900, p. 54).

The original 1898 amendment introduced this exception of government employees' wage suits from district court jurisdiction by adding the following language:

> The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to *cases brought to recover fees, salary, or compensation for official services of officers of the United States,* or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. (Emphasis added)

When the Judicial Code was amended and codified by the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093, no change was made. Paragraph 20 of Section 24 (former 28 U. S. Code 41 (20)) reenacted the exception in the following substantially identical terms:

> Provided, however, that nothing in this paragraph shall be construed as giving to the district courts jurisdiction of *cases brought to recover fees, salary, or compensation for official services of officers of the United States* or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. (Emphasis added)

Finally, in its present form the new 1948 Judicial Code enacted by the Act of June 25, 1948, c. 646, 62 Stat. 869, 933, restated the exception in 28 U. S. Code 1346 (d-2) as follows:

> (d) The district courts shall not have jurisdiction under this section of :
> (2) Any *civil action to recover fees, salary, or compensation for official services of officers of the United States.* (Emphasis added)

Congress has thus adhered throughout to the same language without substantial change. It must therefore be taken to have approved the settled judicial construction of "officers" as including all regular civil-service employees.

The function of the courts in interpreting statutes is to

construe the language so as to give effect to the intent of Congress. *United States* v. *American Trucking Ass'ns.*, (1940) 310 U. S. 534, 542-544. The controling Congressional purpose in originally prohibiting district court jurisdiction of suits for official compensation is plainly stated in H. Rept. No. 325, 55th Congress, 2d Session, February 1, 1898. The pertinent portions of that report declare:

> The reasons for the change rest in part upon—
>
> First. That the circuit and district courts are widely separated geographically, and often while one of them may be deciding a question in one way another may be deciding it another way; and there is now a large number of conflicting judgments on the same questions.
>
> Second. Cases are brought against the United States at places remote from the capital, of which the proper Department is not advised, and proper defenses are impracticable and are often not made. For example—
>
> The Act of July 31, 1894, provides that no person holding an office worth $2,500 per annum shall hold another compensated office.
>
> A held the office of clerk of the circuit court of appeals, of which the compensation exceeded $2,500. He also held the office of clerk of circuit court of the United States, with large compensation. The Treasury refused to pay him for the second office. He thereupon brought suits quarterly in the district court of the United States for less than $1,000, and for a while recovered.
>
> Many other abuses might be cited of a similar general character.

The report thus clearly evidences the Congressional intention that suits for salary, overtime, fees and every other type of official compensation were thereafter to be limited to the Court of Claims—the one court at the seat of the Government in which all departmental records are immediately available and where the defense of the suits can be conducted by attorneys specializing and skilled in the laws and regulations involved.

To construe the word "officer" in any narrow sense, excluding regular civil-service employees, such as appellants, would defeat the express purpose set out in the Committee report except in the cases of a few high officers.

It is plain that the intention of Congress in using the word "officer" in the Tucker Act exception was to employ it in the broad, popular sense, the same as in the Act of July 31, 1894 (28 Stat. 205, 5 U. S. Code 62), referred to by the Committee. That statute, prohibiting dual compensation, like 5 U. S. Code 71, prohibiting additional compensation, would be worthless if restricted. It would be fantastic to hold that the chief officers of the Government were prohibited from double employment where the total salary exceeded $2500 but that subordinate employees might be so employed. Such statutes have always been applied to civil servants of all grades alike. As indicated by the Committee report, the Tucker Act exception should be construed in the same fashion.

The controling considerations for enactment of the exception in 1898 still apply. The evils of conflicting decisions in the numerous district and circuit courts and of the difficulty of providing for the defense at widely divergent points by the small attorney staff available to the Government, which the Committee emphasized in 1898, have increased in importance many fold since 1898. The number of courts and judges has doubled. The technicalities of overtime and bonus payable to many types of civil-service employees, particularly those in the common grades, have grown far beyond those created by the Acts of 1888 and 1892.

The courts have always recognized that in such cases evidence of the facts cannot be furnished by the plaintiffs, but calls must be made on the department involved and the General Accounting Office. The fact that the right to overtime compensation and fees is still governed by a mass of unpublished regulations changing from day to day and difficult of comprehension makes it ever more difficult to prepare such cases without close consultation between the Government's attorneys and its accounting officers. Only at the seat of the Government are found the records and the witnesses who can testify as to the facts in most pay cases. The established rule restricting such suits to the Court of Claims accomplishes this purpose. Yet it works no undue hardship upon a liti-

gant since the Court of Claims follows the practice upon request of the plaintiff of holding hearings for the taking of evidence at his place of residence or at locations serving his convenience and that of his witnesses.

Finally, if we may advert to the merits of the claims of appellants in this particular case, it must be conceded that they represent a relatively simple problem (see *infra*, Point III, pp. 38-47). Indeed, seamen's compensation is not ordinarily difficult even when they serve the United States. And it is for that reason that they have always heretofore been thought to enjoy the traditional admiralty remedy in the district court, although shoreside employees of similar grade must resort to the Court of Claims. But the effect of the change advocated by appellants for this case will reach equally to other civil-service employees who present a different situation. If, in order to permit appellants to maintain this tardy suit, the established rules are set aside, the entire present structure of wage suits will be destroyed and every civil-service employee will be entitled to sue in the district court.

For the foregoing reasons we believe that there should be no departure from the established pattern of judicial decision as to the meaning of the Tucker Act exception of suits for official compensation. This Court should confirm its prior decision in the *Oswald* case and affirm the decision below.

III

The Plain Language of Appellants' Contract Required Dismissal of Their Complaint on the Merits, Even If It Had Been Timely Brought in Admiralty; the Applicable Regulations Only Servè to Re-enforce the Contract Language

Appellants pleaded as an exhibit to their complaint the supplemental contract for overseas service, some form of which all civil-service employees going abroad are required to execute as an assurance to the United States that they will remain overseas for at least a year. The court below, following Judge Bondy in *Henderson* v. *United States*, (S. D. N. Y.) 1947 A. M. C. 1371, 74 F. Supp. 343, 345, held

that appellants here "are not entitled, under the contract terms, to recover what they seek" (R. I 34; 85 F. Supp. at 744). See accord unreported decision of January 31, 1949, by Judge Mathes in *Jentry* v. *United States, infra,* Appendix E, p. 81.

We believe that this conclusion of the district court follows from the unambiguous terms of appellants' supplemental contract for overseas service. However, because appellants suggest that the contract is ambiguous, we have printed in Appendix C and D, *infra,* pp. 62-80, the applicable regulations and administrative decisions which under established law this Court should judicially notice if it finds ambiguity in the contract.[4] These regulations and decisions remove any possibility of ambiguity and show that appellants' suit was correctly dismissed on the merits as well as for want of jurisdiction.

Appellants' claim, as finally submitted to the district court (see *supra,* p. 3) was confined to only three parts: (a) area bonus, (b) overtime pay and (c) sick leave allowance. We will discuss each of these three items hereafter in that order.

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[4] Army regulations, including circulars, directives, memoranda and other official orders, whether of the Department or of subordinate units, are noticed judicially. All acts done in the performance of official duty are matters which may take judicial notice. *Caha* v. *United States,* (1894) 152 U.S. 211, 221-222; *Southern Pacific RR. Co.* v. *Groeck,* (C.C. Calif., 1895) 68 Fed. 609, 612. Even unwritten administrative practices will be noticed. *United States* v. *Birdsall,* (1914) 233 U.S. 223, 230. Introduction into evidence is not necessary. *Labor Board* v. *Atkins & Co.,* (1947) 331 U.S. 398, 406, note 2; *Caha* v. *United States, supra.* Such regulations, even though not formally published in the Federal Register, have the force of law. *Standard Oil Co.* v. *Johnson,* (1942) 316 U.S. 481, 484; *Billings* v. *Truesdell,* (1944) 321 U.S. 542, 551; *United States* v. *Grimaud,* (1911) 220 U.S. 506, 517, 520. The court will itself procure copies of regulations if necessary (*Leonard* v. *Lennox,* (8th Cir., 1910) 181 Fed. 760, 764), although it is preferable practice to put the regulations in the record (*Nagle* v. *United States,* (2d Cir., 1906) 145 Fed. 302, 306). Even on appeal the court may, where necessary, take judicial notice of matters not brought to the attention of the trial court. *American Legion Post No. 90* v. *First National Bank & Trust Co.,* (2d Cir., 1940) 113 F. 2d 868, 872.

A. *Appellants' overseas-service contract makes it plain that the overseas bonus of a flat 100 percent wage increase, in addition to base wages, was to be in lieu of all area and attack bonuses*

The language of appellants' overseas contract makes express provision that 100 percent bonus is paid in lieu of all other bonus, whether for area or attack. Paragraph 1 of appellants' overseas service contract provides, with emphasis supplied (R. I 9), that in addition to his base wages—

> * * * The employee shall be paid such additional increases in wages *as may be prescribed by competent War Department authority* for and on account of the war risk bonuses which are predicated upon transit of areas of risk and the prevailing wage practice of the maritime industry which the War Department is committed to follow as nearly as is practicable under its policy of conforming with the prevailing maritime practice. *It is hereby agreed and understood that in accord with the prevailing maritime wage practices as presently approved and adopted by the War Department* for the area to which the employee is assigned, the employee will be paid in addition to the base wages stipulated above a flat increase in wages of *One Hundred* per cent (*100%*) to be paid upon arrival of the employee at the *European* Theater of Operations, the assigned post of duty or upon reassignment of the employee to the vessel to be delivered to the assigned post of duty.

Paragraph 15 of the contract, confirming that the 100 percent bonus is in lieu of all other bonus, further provides (R. I 16):

> 15. The provisions herein contained *shall be deemed to include and be the equivalent* of the prevailing employment conditions in the maritime industry.

There can thus be no question that, as held by the court below and by the other district courts in the *Henderson* and *Jentry* cases, the appellants "are not entitled, under the contract terms, to recover what they seek."

Appellants, in seeking recovery of additional payments

of bonus not expressly provided for by the contract (see Br. 15-16), are apparently attempting to establish their claims by the contention that other seamen (working under entirely different contracts at entirely different rates of base pay and employed under foreign shipping articles on War Shipping Administration or large transport class vessels of the Army Transportation Corps) received such additional bonuses under such different contracts.[5] The short answer to that contention is that appellants' contracts made no such provision, as did those of W. S. A. seamen and of the articled seamen on large transport type vessels of the Army.

Analysis of Paragraph 1 of appellants' contract (R. I 9) makes plain their special contractual status. The contract begins as follows:

> 1. The Employee, on his representation that he is

---

[5] Appellants assert their claim on the basis of Decision 2B of the Maritime War Emergency Board (R. I 2-3). They entirely disregard, however MWEB Decision 4A describing the period of time during which Decision 2A and its succeeding revisions 2B, 2C, and 2D apply to tugboat seamen, such as appellants, who are employed on WSA tugs. The dominant distinction between appellants' bonus rights and those of WSA tugboat seamen was that appellants received 100 percent overseas bonus even when their vessels were in drydock or in a safe harbor in England (R. II:46-51). Under Decision 4A of the Maritime War Emergency Board (8 F. R. 3462; 46 Code of Fed. Regs., 1943 Supp., p. 2140) WSA tugboat seamen, by contrast, were only paid area bonus "effective at the midnight or noon next preceding the hour on which the vessel proceeds on its employment, and shall terminate on the noon or midnight next succeeding the hour when the vessel is moored upon the completion of its assignment."

In most cases, therefore, ATS seamen, such as appellants, actually collected far more money than WSA tugboat seamen to whom NWEB Decision 4A made applicable Decisions 2A, 2B, 2C and 2D (46 C.F.R., 1943 Supp. p. 2136; *ibid.*, 1944 Supp. p. 3775; *ibid.*, 1945 Supp. p. 4328). Payment of a continuous overseas bonus relieved the Army, however, of a very large accounting burden. It was thought better to pay the added money to the seamen rather than to lay it out in paper work costs.

The purpose and activities of the Board are fully set forth in the Code of Federal Regulations. The Board was appointed by the President to decide issues between the seamen's unions and signatory ship operators. 46 C.F.R., 1943 Supp. p. 2124. See the Board's own statement, 1944 A.M.C. 1020.

> an experienced and qualified A. B. seaman (designation of position) is hereby employed and agrees to serve on a vessel owned, operated, chartered, employed or controlled by the War Department at any post of duty in the world to be determined by the Government to which he may be assigned, for a period of One Year (duration of contract) from the effective date of arrival at the European T. O. (theatre of operation) unless sooner relieved at the pleasure of the Government, from the effective date of this contract * * *.

Considered thus far, the contract employs appellants for service on a vessel of the War Department at any post of duty in the specified area—European Theater in the present cases. Paragraph 1 then continues as follows:

> the Employee agrees to serve at the minimum rate of *$1,200.00* Dollars per annum which shall be considered the base wages of the Employee * * *

The parties thus agree upon a minimum rate of *base wages,* and it is not understood that appellants deny that they have received such base wages. Paragraph 1 then continues, with emphasis supplied, as follows:

> * * * and in addition thereto the Employee shall be paid such additional increases in wages *as may be prescribed by competent War Department authority* * * *

Up to this point the contract provides expressly for payment of (1) a base wage and in addition thereto, (2) such unspecified additional increases, if any, *as may be prescribed by competent War Department authority*—always provided that competent authority decides to prescribe any at all. Then follows the contract language immediately after the words "competent War Department authority" which state for and on account of what things "competent War Department authority" *may* prescribe if it decides to do so, for additional payment. That part of Paragraph 1 describing the limits within which "competent authority" may act, if at all, read as follows:

> * * * for and on account of the war risk bonuses

> which are predicated upon transit of areas of risk and the prevailing wage practice of the maritime industry which the War Department is committed to follow as nearly as is practicable under its policy of conforming with the prevailing maritime practice. * * *

And it is from this just quoted clause of the paragraph that appellants seek to single out and divorce from its context the phrase "the prevailing wage practice of the maritime industry" to support their argument.

Appellants' contention wholly ignores the context of the contract and in doing so ignores the only words of promise in the paragraph, words that unequivocally declare that the sole additional increases that may be paid in any event are such additional increases in wages only as *may be prescribed* by competent War Department authority, and not unless and until so prescribed. The part of Paragraph 1 just quoted, and on which appellants rely, clearly states the things for and on account of which the competent War Department authority may prescribe additional compensation. But it does not say that competent authority will do so.

The remainder of Paragraph 1 then provides what at the time of contracting was to be deemed as the equivalent of "prevailing maritime practice." It reads as follows (R. I 10):

> It is hereby agreed and understood that in accord with the prevailing maritime wage practices *as presently approved and adopted by the War Department* for the area to which the employee is assigned, the employee will be paid in addition to the base wages stipulated above, a flat increase in wages of *One Hundred* per cent (*100%*) to be paid upon arrival of the employee at the European T. O., the assigned post of duty or upon reassignment of the employee to the vessel to be delivered to the assigned post of duty.

The final sentence of Paragraph 1 thus provides for the assignment of the particular appellant to a particular post of duty—the European Theater of Operations. Speaking as of the time of the signing of the contract at the Army Base in Brooklyn, New York, it declares that the particular

appellant and the Government have agreed that in accord with the prevailing wage practices *as approved and adopted by the War Department* (i.e., competent War Department authority) for the particular European Theater of Operations, appellant will be paid a flat increase in wages of 100 percent upon his arrival at the European Theater of Operations, or that the appellant, if assigned to a vessel to be delivered to the European Theater, will likewise be paid such a flat increase in wages of 100 percent.

It is clear from the unambiguous terms of the contract read in their context that the 100 percent increase in wages is to be full satisfaction until any later change of the promise that the appellants will be paid such additional increase in wages as may be prescribed by competent War Department authority. The regulations which this Court should judicially notice, Appendix C, *infra*, pp. 62-71, confirm that nothing beyond the contract rate of base wages plus 100 percent was ever prescribed as bonus.

The general *Marine Personnel Regulations* of the Transportation Corps, which governed appellants, prescribed in Section 5 of Regulation 11 (copies of which in both the original version of July 1, 1944, and the revision of July 15, 1945, *infra*, Appendix C, pp. 65-68) the detailed application of the bonus provision of appellants' contract. The pertinent language follows:

> 115.1 Overseas bonus is payable in lieu of all other war risk bonuses to crew members engaged under contract for overseas employment on vessels permanently assigned to a post of duty in such overseas commands.
>
> * * * * * * *
>
> 115.3 The amount of percentage increase in compensation in lieu of all other bonuses of any other character will be in accord with the percentage stipulated in the contract. * * *

Effective July 1, 1945, shortly before appellants' discharge in July and early August, this was changed to read:

> 115.3 The amount of percentage increase in compensation will be set by the Chief of Transportation * * * Such percentage increase in compensation, in lieu of all other war risk bonuses, will be subject to adjustment from time to time to conform with changes in war hazards as reflected in Decisions of the Maritime War Emergency Board as approved by the War Department.[6]

And that construction is further confirmed by local regulations of the Office of the Chief of Transportation, E. T. O. U. S. A. (European Theater of Operations, U. S. Army), Appendix C, *infra,* pp. 69-71, in Circular No. 16, dated February 19, 1945, providing in Paragraph 1.d.(3) that:

> Inasmuch as extra work by War Department civilian employees, T. C. [Transportation Corps], was taken into consideration in establishing wage scales, overtime compensation will not be paid. *100% Bonus is paid in lieu of all other bonuses.*

There can thus be no question or ambiguity as to the complete absence of any right in appellants to added bonus and, indeed, the *Henderson* and *Jentry* cases, *supra,* like the court below, have so held.

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[6] The provisions of the contract and regulations regarding war bonus were arrived at as a result of the decision of the Maritime War Emergency Board embodied in the letter of its secretary, Erich Nielsen, dated December 8, 1943. Copies of the decisional letter and of all related correspondence are included in Appendix D, *infra,* pp. 72-80. It is there stated that: "Decisions 2 A and 4 A of the Board apply to small vessels operated by signatories of the Statement of Principles except where such operations are conducted wholly or principally within inland waters. The Board recognizes, however, that there are no comparable commercial operations in the European Theater of Operations on the type of vessel and the type of mission to which you advise the War Department vessels and crews are to be assigned. The Board also recognizes that the War Department is not a signatory to the Statement of Principles and that therefore, the Board's decisions would not be binding on the War Department." It has been held that the Board's interpretation of its decisions, as not binding upon non-signatories, is entitled to great weight. *Painter* v. *Southern Transportation Co.,* (E.D. Va., 1948) 80 F. Supp. 756.

B. *Appellants' overseas-service contract makes it plain that performance of overtime was contemplated and was ordinarily to be compensated only by compensatory time off.*

The language of appellants' overseas contract makes it equally plain that they were not entitled to any cash payments for overtime. Paragraphs 4 and 15 of the appellants' contract, with emphasis supplied, provide:

> 4. The Employee shall work whatever hours are required and overtime compensation, if any, may be allowed for work performed on Sundays, Saturday afternoons, holidays, or for extra hours during any day in excess of that normally considered a working day, only provided that payment for such overtime is in accord with the local prevailing practice. *It is hereby agreed and understood, however that the probable performance of such extra work by the Employee has been taken into consideration in establishing the wages specified above.*
>
> * * * * * * *
>
> 15. The provisions herein contained *shall be deemed to include and be the equivalent* of the prevailing employment conditions in the maritime industry.

The final sentences of Paragraphs 4 and 15 thus state that the parties were agreed that performance of overtime has already been taken into consideration in establishing the base wages with respect to the particular post of duty, that appellants were to work whatever hours were required "and overtime compensation, if any, may be allowed * * * *only provided* that payment for such overtime is in accord with the local prevailing practice" and that the contract rate of base pay was deemed to include the equivalent of that prevailing practice.

It is thus clear that the payment of overtime was entirely optional with competent War Department authority and was not contemplated for ordinary overtime but only for extraordinary situations. It *may* or may not be paid but in any event *only* if in accord with the prevailing local practice and since, as described by the correspondence with the Maritime War Emergency Board,

the only civilian-manned small craft operations in the European Theater were those of the Army Transportation Corps, the only local prevailing practice was that of the Transportation Corps itself which was stated in the contract and agreed in Paragraph 15 to be accepted as "the equivalent of the prevailing conditions in the maritime industry."

Again if the matter be ambiguous so as to require this Court to take judicial notice of the applicable regulations, the Marine Personnel Regulations of the Transportation Corps provide in Section 3 of Regulation 6 (copies of which in both the original version of July 1, 1944, and the revision of July 15, 1945, are printed in Appendix E, *infra,* pp. 62-65), the detailed application of the contract provision. These regulations in their 1944 version read:

> Seamen employed aboard vessels carrying inter-island rates of pay will be paid overtime on the same basis as similar personnel aboard transport class vessels. However, this requirement will not apply in Theaters of Operation in which the established practice does not provide for the payment of overtime compensation to seamen employed on such vessels permanently assigned to such overseas commands. * * * Seamen employed aboard small craft and auxiliaries assigned to overseas commands will be paid overtime compensation in accordance with the local comparable prevailing maritime practice.

They were in turn implemented by Circular No. 40, dated June 13, 1944, of the Office of the Chief of Transportation, E. T. O. U. S. A. (European Theater of Operations, U. S. Army), providing in Paragraph 1 d (4) (Appendix D, *infra,* pp. 68-69, and compare Circular No. 16, dated February 19, 1945, Paragraph 1 d (3), *infra,* pp. 69-71) that since extra work "was taken into consideration in establishing wage scales, overtime compensation will not be paid." Circulars 40 and 16 further prescribe in Paragraph 1 k (1) for compensatory time off, directing that—

> In the event it is necessary that the vessel and crew work beyond the 8-hour day, recompense will be made *wherever practicable, at the convenience of the Government, by means of time off on an equitable basis.*

And this was in accordance with the regular provisions of

statutes and regulations as to all civilian government employees.

The same principles apply in respect of appellants' claim, now apparently abandoned, for overtime during the period that they served on their vessels while in transit from the United States to the European Theater of Operations and any return therefrom. In both cases the court below, like the courts in the *Henderson* and *Jentry* cases, correctly held there was no right to overtime.

C. *Appellants' overseas-service contract gives them the same leave status as other civil-service employees and their pleadings and proof do not show they were not paid so far as entitled*

The claim that appellants are entitled to additional payments for sick leave is equally without foundation. Paragraph 9 of appellants' contract provides in pertinent part, with emphasis supplied, that—

> If the employee satisfactorily completes the provisions of this contract and is separated from the service without prejudice, *the employee shall continue in a pay status* beyond the actual date of separation from an active duty status to the extent of his accrued annual leave.

This states the whole of appellants rights which is the same as that of any other civil-service employee of the United States. No payment on account of accrued sick-leave not used was ever promised.

The leave regulations governing civil-service seamen of the Army Transport Service are in all respects the same as those applicable to all other government employees on the date in question. They are set forth in Executive Order 9414, dated January 13, 1944. Seamen on their terminal annual leave could be paid their basic wages only, exclusive of evaluated rates for subsistence and quarters or the bonus in lieu of voyage, area and vessel attack bonuses, which were, of course, applicable only in war zones. It was apparently conceded that appellants had received payment on account of accrued annual leave. (R. II: 52-53,

57.) For sick leave, neither their contract nor the regulations permitted payment.

For the foregoing reasons it is submitted that the court below, like the courts in the *Henderson* and *Jentry* cases, correctly held that, even if appellants had brought timely suit under the Public Vessels and Suits in Admiralty Acts, their claims had no merit but should be dismissed.

CONCLUSION

We believe the court below correctly held that the exclusive jurisdiction of appellants' suit was under the Public Vessels and Suits in Admiralty Acts and that it correctly dismissed the suit as not having been brought within the two-year limitation period of those Acts. We further believe the added holding of the court below that appellants' claims were contrary to the express language of their contracts is equally correct. We therefore respectfully submit that the decision of the court below, dismissing appellants' suit for both want of jurisdiction and on the merits, should be affirmed.

H. G. Morison,
Assistant Attorney General.
Keith R. Ferguson,
Leavenworth Colby,
Special Assistants to the Attorney General.

Frank J. Hennessy,
United States Attorney.
C. Elmer Collett,
Assistant United States Attorney.

APPENDIX A

JURISDICTIONAL STATUTES

1. The Suits in Admiralty Act provides in pertinent part (46 U. S. Code 742, 745):

> 742. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *
>
> * * * * *
>
> 745. Suits authorized by this chapter may be brought only on causes of action arising since April 6, 1917: *Provided,* That suits based on causes of action arising prior to the taking effect of this chapter shall be brought within one year after this chapter goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises: * * *

2. The Public Vessels Act provides in pertinent part (46 U. S. Code 781, 782):

> 781. A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: * * *
>
> 782. * * * Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

3. The Tucker Act, as amended (28 U. S. Code 1346, 2401), provides in pertinent part:

> 1346. *United States as defendant.*
>
> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * * *

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States.

* * * * *

2401. *Time for commencing action against United States.*

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

APPENDIX B

Statutes and Regulations Relating to Civil Service Appointments of Army Transport Seamen

1. The Constitution of the United States in Article II, Section 2, provides in pertinent part:

> * * * The Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

2a. Revised Statutes 169, as amended (5 U. S. Code 43), provides:

> There is authorized to be employed in each executive department * * * such number of employees * * * as may be appropriated for by Congress from year to year: *Provided,* That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

2b. Act of June 5, 1942, c. 340, s. 3, 56 Stat. 314 (50 U. S. Code Appx.) provides in pertinent part:

> 763. (a) The Secretary of War is hereby authorized to effect appointments of civilian employees in the United States, or to effect the transfer of such employees in the Federal Service in the United States, for duty at any point outside the continental limits of the United States or in Alaska at which it may be found necessary to assign such civilian employees, and to pay the costs of transportation of such employees from the place of engagement in the United States, or from the present post of duty in the United States or in Alaska, if already in the Federal Service, to the post of duty outside the United States and return upon relief therefrom, and to provide for the shipment of personal effects of persons so appointed or transferred from the place of engagement or transfer to the post of duty outside the continental United States or in Alaska and return upon relief therefrom.

3. Secretary of War's Orders M, August 14, 1942, provide:

> War Department,
> Washington, *August 13, 1942.*
>
> Orders:
>
> 1. The very rapid increase in the number of civilians required throughout the War Department to prosecute

the war effectively demands that personnel be obtained and put to work quickly. This will be facilitated by the establishment of simple procedures for completing personnel actions in the lowest operating echelons practicable, and by the operation of judicious controls to insure the maintenance of uniform standards.

2. The Office of the Secretary of War will take the necessary steps to decentralize to the proper operating units in both the departmental and field services of the War Department the processing of all personnel actions. In order to provide experienced personnel to the departmental and field services so that they can operate satisfactorily under this program, arrangements will be made prior to September 1 to transfer from the Office of the Secretary of War available personnel to the payrolls of the operating units, and the Office of the Secretary of War will upon request assist in training any additional persons required.

3. Authority is hereby delegated to the Commanding Generals, Services of Supply, Army Air Forces, and Army Ground Forces, to take final action on personnel transactions in the field service, except on separations with prejudice.

4. The Civilian Personnel Division of the Office of the Secretary of War will, through representatives stationed in the operating personnel offices of the departmental service, approve for the War Department the allocation of all classified positions and will review all instruments pertaining to personnel transactions prior to approval by the Secretary of War. In the field service, representatives of the Civilian Personnel Division of the Office of the Secretary of War will assure compliance in action taken under the above delegated authority with Departmental policies, standards, and procedures; Civil Service rules and regulations; Comptroller General's decisions; and established legal requirements; by the appropriate audit and inspection of such actions and will receive all appropriate information to effect the same.

5. These orders will be effective September 1, 1942. Orders N of December 23, 1941, Orders I of July 3, 1942, and any or all portions of any other orders or

memoranda conflicting with the provisions of these orders are rescinded as of September 1, 1942.

HENRY L. STIMSON,
Secretary of War.

M.
93-842

4. Services of Supply, Civilian Personnel Memorandum 18, August 19, 1942:

WAR DEPARTMENT

Headquarters, Services of Supply

Washington

August 19, 1942.

SPX 230.2 (8-17-42) SPGC-PS-M

S.O.S. CIVILIAN PERSONNEL MEMORANDUM NO. 18

Subject: Delegation of authority for appointment and classification of civilian personnel.
To: Chiefs of Supply Services, Chief of Administrative Services, Commanding Generals, all Service Commands.

1. This is in reference to Orders M of the Secretary of War, dated August 13, 1942, decentralizing civilian personnel functions to the Commanding General, Services of Supply. The following authority and responsibilities are redelegated, effective September 1, 1942:

DEPARTMENTAL PERSONNEL

2. The chiefs of the supply services and the Chief of Administrative Services will be responsible for the administration of their classification programs, including the survey of civilian positions in their respective departmental services, the preparation of job descriptions, the determination of appropriate position allocations, and submission to the representatives of the Civilian Personnel Division, Office of the Secretary of War.

3. Each chief of a supply service and the Chief of Administrative Services are authorized to negotiate directly with the Civil Service Commission for eligibles for filling of their departmental vacancies, except that requisitions for typists, stenographers, messengers, and clerks, for posi-

tions of grade not higher than CAF 2, will clear through such central pools as may be in operation. On permission of the Civil Service Commission with respect to any particular position or positions, the respective services may recruit eligibles outside of registers, and negotiate with the Commission for authority to make appointments.

4. The several supply and administrative services will be responsible for the preparation of all papers or instruments necessary to effect departmental appointments or other civilian personnel changes, and the daily preparation of a journal of personnel actions and its transmission for approval through the representatives of the Civilian Personnel Division of the Office of the Secretary of War.

5. In order that the procedures and forms may be uniform throughout the Services of Supply, standard instructions will be issued from this headquarters.

Field Personnel

6. Authority to make field appointments and to effect any other changes in status for civilian field personnel so far as consonant with laws, Civil Service rules, departmental regulations, approved tables of organization, and classification standards, is hereby delegated to the chiefs of supply services, the Chief of Administrative Services, and the commanding generals of service commands, except that termination with prejudice from any position must have prior approval of the Civilian Personnel Division, this headquarters, and of the Office of the Secretary of War.

7. The supply and administrative services and service commands through their field personnel offices, are authorized to negotiate directly with the Civil Service Commission respecting lists of eligibles, authority to appoint, and similar matters.

8. The authority to make appointments and other personnel changes, and the processing of all papers incident thereto should be transferred to the appropriate field units as soon as practicable following the issuance of standard instructions by this office and when personnel has been trained for handling of such functions.

9. In order to expedite the processing of personnel actions and at the same time obtain the greatest possible standardization of position classification throughout the Services of Supply, authority should be redelegated wher-

ever possible to appropriate field units to allocate the classification of field positions and to determine proper ranks, grades, and salaries of unclassified positions, subject to the following provisions:

a. Allocation may be made by reference to standard approved job descriptions by code or number, in lieu of writing individual job descriptions. Separate notices will be issued listing standard job descriptions which are approved for use in this connection.

b. For positions not described in approved standard job descriptions, individual job descriptions will be prepared, and the positions allocated in accordance with the approved tables of organization and classification standards.

c. All allocations based on either approved standard job descriptions or upon individual job descriptions made by field units will be subject to post audit or inspection, and revision by representatives of the respective chiefs of services, commanding generals of service commands, or by Headquarters, Services of Supply.

10. Processing of all personnel instruments and all actions taken under authority delegated above, including the allocations of classified positions, will be subject to post inspection by representatives of the Civilian Personnel Division of the Office of the Secretary of War, as provided in paragraph 4 of Orders M.

By command of Lieutenant General Somervell:

J. A. Ulio,
Major General,
Adjutant General.

Incl.
Orders M.

5. Chief of Transportation, Personnel Bulletin No. 12, October 7, 1942:

War Department

Office of the Chief of Transportation

Washington, D. C.

Personnel Bulletin
No. 12 — October 7, 1942.

Delegation of Authority for Civilian Personnel Field Actions—I. Pursuant to authority delegated by the Secre-

tary of War in Orders "M" of August 13, 1942, to The Commanding General, Services of Supply, and to the authority delegated by him to the Chief of Transportation in his letter of August 19, 1942, authority is hereby delegated, effective October 15, 1942, to the Commanding Officers of: Ports of Embarkation, Port Agencies, Holding and Reconsignment Points, Transportation Agencies, and to the Senior Transportation Officer in exempted installations of other Services to take final action on appointments to, promotions (as distinct from reclassification) to, changes in status to, and terminations from, established positions, with the exception of terminations with prejudice. Authority to make permanent transfers between stations is not delegated.

II. The following procedure will be followed:

A. All field civilian personnel actions, including both graded and ungraded positions, will be taken by the completion of Form CP-50 *only*. Therefore, Forms CP-56 and CP-58 will be discontinued on effective date of this delegation.

B. The following distribution of the Forms CP-50 will be used:

1. Temporary Series: The original copy with two duplicates will be forwarded direct to the Office of the Chief of Transportation together with a statement on Form CP-50 as to the number of the position. In the Temporary Series, a copy will be forwarded by the station direct to the appropriate Civil Service Regional Director. The Commanding Officer will determine what additional copies are required for station files.

2. Permanent Series: The original copy and three duplicates will be forwarded to the Office of the Chief of Transportation together with a statement on Form CP-50 as to the number of the position.

3. A copy will be given to the employee.

4. It is important that the Form CP-50 be completed to show appropriate entries, *including the authority under which the position was established.*

5. The necessary appointment forms will be completed in the usual manner. These will include:

a. The Civil Service Regional Director:

(1) Form CP-57
(2) Fingerprint Chart No. 2390
(3) Medical Certificate No. 2413
(4) Form 2806-1
(5) Any other forms which may be required by the Civil Service Regional Director from time to time.

b. On Station File:

(1) Oath of Office Form CP-18
(2) Declaration of Appointee Form 124B

III. The authority herein delegated to Commanding Officers will be the direct responsibility of such officers and will be exercised by them in the Central Civilian Personnel Office of each station. All actions taken in accord with the above redelegation will be subject to post audit by the Office of the Chief of Transportation; by the Headquarters, Services of Supply; and, by the Office of the Secretary of War.

By Command of Major General Gross:

Fremont B. Hodson,
Colonel, Transportation Corps,
Assistant Chief of Transportation
for Administration.

Official:

Robert H. Soule,
Colonel, Transportation Corps,
Director of Administration.

6. Secretary of War's Civilian Personnel Circular No. 69, December 16, 1943:

War Department

Washington 25, D. C., 16 December 1943.

Civilian Personnel Circular
No. 69

Approval of personnel action—1. The approval of personnel actions must be exercised in accordance with the requirements of law and the Comptroller General's decisions. This circular is issued for the purpose of assuring

that personnel actions are effected in accordance with those requirements.

2. Civilian personnel actions must be approved by the officer of the installation who has specific written delegation of authority to approve. Such delegation must be from the Commanding General of the appropriate force or command, or from the commanding officer of the station to a subordinate pursuant to a specific written delegation authorizing the commanding officer to designate a subordinate to approve personnel actions.

3. Personnel actions are considered in two categories:

a. Administrative personnel actions, requiring approval on or prior to their effective date. For example, appointment, promotion, reassignment, transfer, demotion, removal, separation for inefficiency, separation for reduction in force, furlough for reduction in force, extension of temporary appointment, etc.

b. Confirmatory personnel actions, which are automatically effective without approval, but which are approved to make them official. For example, acceptance of resignation, military furlough, change in name, periodic within-grade promotion, etc.

4. Administrative personnel actions cannot be retroactively effective. They must be approved on or prior to their effective date, even though organization, classification, Civil Service, or other necessary approvals have been obtained before final administrative approval is given. Failure to comply with this requirement of law may result in exceptions in the accounts of disbursing officers for payments made in such cases.

5. Confirmatory personnel actions may be retroactively effective. The effective dates of such actions are set by circumstances beyond the control of the approving officer, and therefore do not constitute an administrative personnel action.

6. The Forms No. C. P.-50 (or AC, C. P.-50), Notification of Personnel Action, will be prepared for all personnel actions, except those where lists are used, such as for group wage adjustments, mass transfers, etc. (see CPR 35.14-5). For administrative personnel actions, the date of the Form No. C. P.-50 must be *on or prior to* the effective date of the action. In all cases, the pay roll copy of the Form No. C. P.-50 (or copy of the list in case of group

wage adjustments and mass transfers) will be submitted to the pay roll office, and will be used by the pay roll certifying officer as the basis for the pay transaction. The facsimile or typed signature of the approving authority on the pay roll copy will be sufficient evidence of official approval.

7. Forms No. C. P.-50 and AC, C. P.-50 are currently in process of revision and stocks of the present forms should not be procured for use beyond 30 April 1944.

8. This circular is applicable to all War Department employees within the continental limits of the United States. Further instructions regarding the approval of personnel actions outside the United States will be issued at a later date.

(A. G. 230 (16 Dec. 43).)

By order of the Secretary of War:

WM. H. KUSHNICK,
Director of Civilian Personnel
and Training.

OFFICIAL:
J. A. ULIO,
Major General,
The Adjutant General.

7. Chief of Transportation, Circular 10-1, April 7, 1944:

Army Service Forces
Office of the Chief of Transportation
Washington, 7 April 1944.

TC Circular
No. 10-1

DELEGATIONS OF AUTHORITY

Approval of Personnel Actions

1. Pursuant to Civilian Personnel Circular No. 69, dated 16 December, 1943, as amended by Civilian Personnel Circular No. 29, dated 16 March 1944, the following officials are hereby authorized to approve personnel actions:

Port Commanders
Commanders of Sub-Ports and Staging Areas
Zone and District Transportation Officers
Commanders of Holding and Reconsignment Points
Chief, Field Service Group, Transportation Corps

The above named officials may further delegate this au-

thority to commanders of Transportation Corps installations under their jurisdiction.

2. Such officials may authorize in writing subordinates to sign personnel actions, "Forms CP-50". If a subordinate is authorized to sign personnel actions, he will sign his own name personally, "For the Commanding Officer", or "By order of the Commanding Officer". No person will be authorized to sign the subordinate's name except when such person is acting in the absence of the subordinate.

3. Personnel actions are considered in two categories:

a. Administrative personnel actions, requiring approval on or prior to their effective date. For example, appointment, promotion, reassignment, transfer, demotion, removal, separation for inefficiency, separation for reduction in force, furlough for reduction in force, extension of temporary appointment, etc.

b. Confirmatory personnel actions, which are automatically effective without approval, but which are approved to make them official. For example, acceptance of resignation, military furlough, change in name, periodic within-grade promotion, etc.

4. Administrative personnel actions cannot be retroactively effective. They must be approved on or prior to their effective date, even though organization, classification, Civil Service, or other necessary approvals have been obtained before final administrative approval is given. Failure to comply with this requirement of law may result in exceptions in the accounts of disbursing officers for payments made in such cases.

5. Confirmatory personnel actions may be retroactively effective. The effective dates of such actions are set by circumstances beyond the control of the approving officer, and therefore do not constitute an administrative personnel action.

6. The Forms CP-50, Notification of Personnel Action, will be prepared for all personnel actions, except those where lists are used, such as for group wage adjustments, mass transfers, etc. For administrative personnel actions, the date of the Form CP-50 must be on or prior to the effective date of the action. In all cases, the pay roll copy of the Form CP-50 will be submitted to the pay roll office, and will be used by the pay roll certifying officer as the basis for the pay transaction. The facsimile or typed

signature of the approving authority on the pay roll copy will be sufficient evidence of official approval.

(SPTPI)

C. P. GROSS,
Major General,
Chief of Transportation.

Official:

CLIFFORD STARR,
Colonel, Transportation Corps,
Chief, Administrative Division.

8. Secretary of War's Civilian Personnel Circular No. 29, March 16, 1944:

WAR DEPARTMENT,
Washington 25, D. C., 16 March 1944.

Civilian Personnel Circular
No. 29

Approval of personnel action.—Paragraph 2, Civilian Personnel Circular No. 69, 16 December 1943, is rescinded and the following substituted therefor:

2. Civilian personnel actions (Form CP-50, AC-CP-50) must be signed by the official of the installation who is authorized in writing to approve personnel actions. Such authority must originate from a delegation of authority from the commanding general of the appropriate force, service, or command to the official exercising the command function at the installation; such officials may authorize in writing subordinates (preferably by position title) to sign personnel actions provided the delegation from the force, service, or command authorizes such action. In any event, if a subordinate is authorized by an official in command to sign personnel actions, he must sign his own name personally "For the Commanding Officer," or "By Order of the Commanding Officer," etc. The subordinate will not authorize another individual to sign in his place, except when the individual is acting in his position because of his absence from duty.

(A. G. 230 (16 Mar 44).)

By order of the Secretary of War:

WM. H. KUSHNICK,
Director of Civilian Personnel
and Training.

Official:

J. A. ULIO,
Major General,
The Adjutant General.

9. Chief of Transportation, Circular 10-1, change No. 1, April 15, 1944:

Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C., 15 April 1944

TC Circular
No. 10-1
Change No. 1

DELEGATIONS OF AUTHORITY

Approval of Personnel Actions

Paragraph 1 of TC Circular 10-1, dated 7 April 1944, is hereby rescinded and the following substituted therefor:

1. Pursuant to Civilian Personnel Circular No. 69, dated 16 December, 1943, as amended by Civilian Personnel Circular No. 29, dated 16 March 1944, the following officials are hereby authorized to approve personnel actions:

Port Commanders
  Commanders of Sub-Ports and Staging Areas
Zone and District Transportation Officers
Commanders of Holding and Reconsignment Points

The above named officials may further delegate this authority to commanders of Transportation Corps installations under their jurisdiction.
(SPTPI)

C. P. GROSS,
Major General,
Chief of Transportation.

Official:
CLIFFORD STARR,
Colonel, Transportation Corps,
Chief, Administrative Division.

APPENDIX C

Regulations Relating to Overtime and Overseas Bonus of Army Transport Service Seamen

1. Transportation Corps, Marine Personnel Regulations No. 6 (Overtime):

MPRTC 6.3 1-4

Section 3

Overtime for Crew Members Aboard Inter-Island Class Vessels and Small Craft

	Paragraph
General Provisions	1
When Provisions of Overtime Law Apply	2
Overtime Compensation for Ferrying Masters and Chief Engineers	3
Overtime for Employees in Stand-by Pools	4

General Provisions

63.1 a. Seamen employed aboard vessels carrying inter-island rates of pay will be paid overtime on the same basis as similar personnel aboard transport class vessels. However, this requirement will not apply in Theaters of Operation in which the established practice does not provide for the payment of overtime compensation to seamen employed on such vessels permanently assigned to such overseas commands.

b. Seamen employed aboard small craft and auxiliaries assigned to overseas commands will be paid overtime compensation in accordance with the local comparable prevailing maritime practice. Similarly, seamen employed aboard small craft and auxiliaries in the States will be paid overtime compensation so as to conform with the local prevailing maritime practice.

When Provisions of Overtime Law Apply

63.2 Where no local prevailing wage or union agreements exist which reflect the local prevailing overtime rates and practices applicable to the small craft, overtime compensation will be paid on the basis of the overtime rates and conditions set forth in Public Law 49—78th Congress. Attention is invited to the fact that only in cases where no counterpart exists in prevailing maritime practice will personnel aboard such vessels be paid overtime compensation on a

similar basis as similar classes of shore personnel to whom the prevailing overtime laws apply.

Overtime Compensation for Ferrying Masters and Chief Engineers

63.3 Ferrying Masters and Chief Engineers assigned to small vessels for the purpose of insuring the safe and efficient delivery of vessels, will not be paid overtime compensation.

Overtime for Employees in Stand-by Pools

63.4 Employees in stand-by pools will not be worked overtime except in unusual or emergency work situations. However, where overtime work is authorized to be performed by such personnel, overtime compensation will be paid in accord with local prevailing maritime practice. In the absence of local prevailing maritime practice, such personnel may be compensated for overtime work in accord with the provisions of the overtime law applicable to shore personnel.

MPRTC 6.3 (Revised)
Change No. 3, 1 July 1945.

Section 3

Overtime for Crew Members Aboard Inter-Island Scale Vessels and Small Craft

	Paragraph
General Provisions	1
Hours of Duty	2
Overtime Compensation	3
Overtime Compensation for Ferrying Masters and Chief Engineers	4
Overtime for Employees in Stand-by Pools	5

General Provisions

63.1 Seamen employed aboard vessels carrying inter-island rates of pay will be paid overtime on the same basis as similar personnel aboard transport class vessels, subject to the following exceptions:

a. Where there are three officers or less in either the Deck or Engine Department, overtime compensation will be paid to the Master and Chief Engineer.

b. The foregoing requirements, however, will not apply in Theaters of Operation in which the established practice does not provide for the payment of overtime compensation to seamen employed on such vessels permanently assigned to such overseas commands. Seamen employed on such vessels shall be required to work whatever overtime hours are requested. The terms and conditions prevailing in the industry at the place where the work is performed shall determine whether or not overtime compensation will be paid.

Hours of Duty

63.2 Hours of duty for civilian marine personnel assigned to inter-island scale vessels and small craft will be established in written orders by the port, station, or, post commander concerned. In cases where such vessels are engaged in sea voyages, the applicable sea watches set forth in Section 2 of this Regulation may be implemented. The daily and weekly tours of duty will be set to conform with local prevailing maritime practice. In the absence of comparable local prevailing maritime practice, a regular weekly tour of duty of 40 hours may be established provided such tour of duty is in accord with operating considerations of the vessel. In cases where such tour of duty is not in accord with operating requirements, tours of duty on a basis other than that described above may be established, subject to approval by the Office of the Chief of Transportation.

Overtime Compensation

63.3 Where no local wage or union agreements or other prevailing practice exist which reflect the local prevailing overtime rates and practices applicable to small craft, overtime compensation will ordinarily be approved on the basis of straight time and one-half of the basic wage rates for work performed in excess of 40 hours per week. In some cases, the local prevailing practice may be that of the Army for a specialized type of operation requiring unusual tours of duty. The basis of overtime pay on whatever tour of duty is established requires the prior approval of the Office of the Chief of Transportation.

Overtime Compensation for Ferrying Masters and Chief Engineers

63.4 Ferrying Masters and Ferrying Chief Engineers

assigned to small vessels solely for the purpose of insuring the safe and efficient delivery of vessels, will not be paid overtime compensation.

Overtime for Employees in Stand-by Pools

63.5 Employees in stand-by pools will not be worked overtime except in unusual or emergency work situations. However, where overtime work is authorized to be performed by such personnel, overtime compensation will be paid in accord with local prevailing maritime practice. In the absence of local prevailing maritime practice, such personnel may be compensated for overtime work on the basis of time and one-half for work performed in excess of 40 hours per week.

2. Transportation Corps, Marine Personnel Regulations No. 11 (overseas bonus):

MPRTC 11.5 1-4

Section 5

Overseas Bonus—Special Applications

	Paragraph
Definition	1
Where Such Bonus is Payable	2
Amount of Bonus Payments Applicable in Such Areas	3
Effect of Such Bonus Provisions Upon Article Seamen	4

Definition

115.1 Overseas bonus is payable in lieu of all other war risk bonuses to crew members engaged under contract for overseas employment on vessels permanently assigned to a post of duty in such overseas commands.

Where Such Bonus is Payable

115.2 Such bonuses are presently payable to crew members assigned for permanent duty in the following Theaters of Operation, or employed under contracts so providing:

a. Southwest Pacific Area

b. European Theater of Operation

c. North African Theater of Operation

Amount of Bonus Payments Applicable in Such Areas

115.3 The amount of percentage increase in compensation in lieu of all other bonuses of any other character will be in accord with the percentage stipulated in the contract. Where no contract is executed, the percentage increase will be that set by the Chief of Transportation for that overseas command. Such additional compensation continues payable uninterruptedly from the time that the employee arrives at the assigned overseas post of duty and terminates upon his departure therefrom unless otherwise stipulated in the employment contract.

Effect of Such Bonus Provisions Upon Article Seamen

115.4 Such flat percentage increase in compensation in lieu of all other bonuses is applicable only to seamen who are appointed for permanent duty at overseas commands in which the Chief of Transportation has established such bonus practice. Accordingly, where the master, officers or crew members of a transport class vessel or any other type of vessel not permanently assigned to the theater of operation specified above, arrives at such area, the applicable war risk bonus set forth in sections 2, 3, and 4 of these Regulations continue payable subject to the conditions and limitations incident thereto, notwithstanding the fact that there are contract employees in such area who receive a flat increase in compensation in lieu of other war risk bonuses. However, where article employees or others are subsequently permanently assigned to that theater of operations for permanent duty, the established War Department bonus practice in that area will be applicable to all crew members who are so assigned to that theater of operations for permanent duty.

MPRTC 11.5 (Revised)
Change No. 3, 15 July 1945

Section 5

Overseas Bonus—Special Applications

	Paragraph
Definition	1
Where Such Bonus is Payable	2
Amount of Bonus Payments Applicable in Such Areas	3
Effect of Such Bonus Provisions Upon Article Seamen	4

Definition

115.1 Overseas bonus is a flat percentage increase in compensation, payable, in lieu of all other war risk bonuses, to crew members engaged under contract for overseas employment on vessels permanently assigned to such overseas commands.

Where Such Bonus is Payable

115.2 Such bonus is presently payable to crew members assigned to permanent duty in the following Theaters of Operations, or employed under contracts so providing:

a. Southwest Pacific Area

b. Pacific Ocean Areas

c. European Theater of Operation

d. North African Theater of Operation

Amount of Bonus Payments Applicable in Such Areas

115.3 The amount of percentage increase in compensation will be set by the Chief of Transportation at a rate to approximate and to be payable in lieu of the voyage, area and vessel attack bonuses as set forth in Sections 2, 3, and 4 of this Regulation. Such percentage increase in compensation, in lieu of all other war risk bonuses, will be subject to adjustment from time to time to conform with changes in war hazards as reflected in Decisions of the Maritime War Emergency Board as approved and adopted by the War Department. Such percentage increase in compensation continues payable uninterruptedly from the time the employee arrives at his assigned overseas post of duty and terminates upon his departure therefrom, unless otherwise stipulated in the employment contract.

Effect of Such Bonus Provisions Upon Article Seamen

115.4 Such flat percentage increase in compensation in lieu of all other bonuses is applicable only to seamen who are appointed for permanent duty at overseas commands in which the Chief of Transportation has established such bonus practice. Accordingly, where the master, officers or crew members of a transport class vessel or any other type of vessel not permanently assigned to the theater of operation specified above, arrives at such area, the applicable war risk bonus set forth in Sections 2, 3, and 4 of these Regula-

tions continue payable subject to the conditions and limitations incident thereto, notwithstanding the fact that there are contract employees in such area who receive a flat increase in compensation in lieu of other war risk bonuses. However, where article employees or others are subsequently permanently assigned to that theater of operations for permanent duty, the established War Department bonus practice in that area will be applicable to all crew members who are so assigned to that theater of operations for permanent duty.

3. European Theater of Operations, Office of the Chief of Transportation, Circulars relating to Civilian Vessel Employees:

HEADQUARTERS, COMMUNICATIONS ZONE ETOUSA, OFFICE OF THE CHIEF OF TRANSPORTATION, APO 887

Circular No. 40

13 June 1944.

WAR DEPARTMENT CIVILIAN EMPLOYEES WITH TRANSPORTATION CORPS

1. The administrative procedures and policies as set forth herein will govern War Department Civilian Employees on duty with the Transportation Corps ETOUSA. All previous instructions issued by this office are rescinded.

a. General:

(1) War Department Civilian Employees assigned to the Transportation Corps are attached to the 5th Group Regulating Stations (TC), and will be placed on detached service with ports as required, and as directed by the Chief of Transportation, by orders issued by the Commanding Officer, 5th Group Regulating Stations (TC).

* * *

d. *Pay:*

* * *

(4) Inasmuch as extra work by War Department civilian employees was taken into consideration in establishing wage scales, *overtime compensation will not be paid.*

* * *

k. *Working Day:*

(1) While at sea, the working day will be such

as is necessary to perform the duties required and maintain the safety of the vessel. When operating within the Port Area, an eight (8) hour day, six (6) day week will be maintained, insofar as operations permit. In the event it is necessary that the vessel and crew work beyond the eight (8) hour day, recompense will be made wherever practicable, at the convenience of the Government, by means of time-off on an equitable basis.

(2) Personnel not actually assigned to duty aboard ship may be employed in connection with the maintenance of these vessels as directed by the Port Captain.

* * *

FRANK S. ROSS,
Brigadier General, U.S. Army,
Chief of Transportation.

OFFICIAL:
(s.) SAMUEL A. DECKER,
Colonel, T.C.,
ACOT-Administration.

HEADQUARTERS, COMMUNICATIONS ZONE ETOUSA, OFFICE OF THE CHIEF OF TRANSPORTATION, APO 887

Circular No. 16

19 February 1945.

WAR DEPARTMENT CIVILIAN EMPLOYEES WITH TRANSPORTATION CORPS

1. The administrative procedures and policies as set forth herein will govern War Department Civilian Employees, TC, on duty with the Transportation Corps, ETOUSA. Circular No. 40, OCOT, 13 June 44, is hereby rescinded.

a. General:

(1) War Department Civilian Employees, TC, assigned to the Transportation Corps are attached to the 5th Group Regulating Station, TC, and will be placed on detached service with ports as required, and as directed by the Chief of Transportation, by

orders issued by the Commanding Officer, 5th Group Regulating Station, TC, APO 413, U. S. Army.

* * *

d. *Pay.*

* * *

(3) Inasmuch as extra work by War Department Civilian Employees, TC, was taken into consideration in establishing wage scales *overtime compensation will not be paid.* 100% Bonus is paid in lieu of all other bonuses.

(4) WD Civilian Employees, TC, will be paid base wages only during periods of hospitalization or sick in quarters in accordance with provisions of employment contract.

* * *

k. *Working Day.*

(1) While at sea, the working day will be such as is necessary to perform the duties required and maintain the safety of the vessel. When operating within the Port Area, an eight (8) hour day, six (6) day week will be maintained, insofar as operations permit. In the event it is necessary that the vessel and crew work beyond the eight (8) hour day, recompense will be made wherever practicable, at the convenience of the Government, *by means of time off on an equitable basis.* Certification of overtime will be made by Port Captain, and time off approved by CO, 5th Group Regulating Station, TC, or in case of emergency by Port Commander.

(2) WD Civilian Employees, TC, not actually assigned to duty aboard ship may be employed in connection with the maintenance of these vessels.

* * *

p. *Awards*

(1) Recommendations for awards and decorations to WD Civilian Employees, TC, will be handled in accordance with AR 600-45, Current Theater Directives and letter, Hq 5th Group Regulating Station,

TC, 200.6, 6 Feb. 45, subject, Awards and Decorations, WD Civilian Employees, TC.

FRANK S. ROSS,
Major General, U. S. Army,
Chief of Transportation.

OFFICIAL:
(s.) SAMUEL A. DECKER,
Colonel, TC,
ACOT-Administration.

APPENDIX D

Decisions of the Maritime War Emergency Board on the Question of Bonus Payable to Army Transport Service Seamen

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War Department, Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C.

5 August 1943.

Maritime War Emergency Board,
Commerce Building,
Washington, D. C.

Attention: Mr. Baldwin.

Dear Mr. Baldwin:

With the assistance of the Recruiting and Manning Organization of the War Shipping Administration, the Transportation Corps of the Army is engaged in a very large recruiting program for marine personnel on boats smaller than the transport class owned or operated by the War Department, assigned for duty to the South and Southwest Pacific Area.

While it is understood that the Maritime War Emergency Board Decisions 2a and 4a are not applicable to operators of small craft, personnel recruited for such duty are necessarily procured in a competitive market with respect to those employed on boats to which these Decisions do apply. The War Department, it is believed, will constitute the largest operator of boats in the areas to which reference is made, and it is the prevailing practice in that area, as evidenced by contracts of employment between the War Department and such marine personnel, to pay a one hundred per cent bonus over base pay without either Port Attack Bonus, Area Bonus, or the Voyage Bonus, as set forth in the Decisions referred to. Informal discussions with representatives of the War Shipping Administration, RM&O, and your organization indicate the desirability of amending these Decisions to correspond to the generally-prevailing practice in such areas. Accordingly, it is recommended that Maritime War Emergency Board Decisions 2a and 4a be amended, providing substantially as follows:

"All boats permanently assigned to a post of duty in which the Area Bonus, under Decision No. 2a of the

Maritime War Emergency Board, is applicable, except those engaged in trans-oceanic voyages, will not receive an Area Bonus.

"All boats permanently assigned in a combat area, and in cases where such boats regularly make ports of call within such combat area, except those engaged in trans-oceanic voyages, will not receive or be eligible for the Port Attack Bonus.

"In lieu thereof, on boats permanently assigned in a combat area, a flat one hundred per cent bonus increase of wages will be paid to the personnel employed on such boats, which will be deemed the equivalent of, and in lieu of, all other types of bonus payments."

The foregoing recommendation is the considered opinion of representatives of commanders in such areas, and it is believed will be satisfactory to all concerned. For that reason, it is urged that a formal decision be promulgated relating specifically to such areas so that uniformity of bonus payments may be achieved.

This office will be glad to discuss this matter with the representative of your organization at greater detail, if such should be deemed desirable.

Sincerely,

ALEXANDER COREY,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)
[undated]

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

Your letter of August 5, 1943 to Mr. Baldwin, concerning certain Army operations in the Australian area and your request for a Board ruling concerning bonus payable on such operations, has been submitted to the Board and considered by them.

You will recall that shortly after the outbreak of the war between the United States and the Axis powers, a series of conferences was held between the various maritime unions and the steamship operators of the American merchant marine. These conferences culminated on December 19, 1941 in the execution of an agreement known as the Statement of Principles.

The Statement of Principles provided for the creation of the Maritime War Emergency Board, the members of which were to be designated by the President of the United States. The signatories gave mutual assurances against strikes, stoppages of work, and lockouts; and agreed that all matters relating to war risk compensation and war risk insurance would be settled on a uniform basis by the Board; and that the Decisions of the Board were mandatory on the parties signatory.

The Maritime War Emergency Board has issued nine decisions concerning the payment of war risk compensation (bonuses and detention and repatriation benefits), concerning reimbursement for loss of personal effects and concerning insurance benefits (loss of life and disability). These decisions have been modified from time to time to meet changes arising in the course of the war. The Board has also issued several thousand interpretations or rulings with respect to matters involving specific situations. In fact, its decisions and rulings have met with general acceptance by the maritime industry.

The War Department is not a signatory to the agreement, and, therefore, is not bound by the action of the Board.

The decisions which the Board has issued were designed primarily to cover commercial operations of the American merchant marine. As you indicate in your letter, the operation involved is not a marine operation but rather an operation of a quasi-military nature, and compliance with the existing decisions of the Board would introduce additional complications in an already complex operation.

The Board does not believe that it should issue a decision covering the matter. However, your attention is invited to the processes which were followed in the formulation of the several bonus decisions and it is suggested that such processes be adopted wherever possible in the interests of uniformity.

The Board appreciates your suggestion and stands ready to render any assistance by decision within its authority

or by mutual consultation looking toward general stabilization of the war risk bonus and insurance structure.

Sincerely yours,

ERICH NIELSEN,
Secretary.

WAR DEPARTMENT, ARMY SERVICE FORCES
Office of Chief of Transportation
Washington 25, D. C.

25 September 1943.

Maritime War Emergency Board,
Department of Commerce Building,
Washington, D. C.

Attention: Mr. J. G. Baldwin

GENTLEMEN:

Recently this office had requested a decision from the Board with respect to the applicability of the Maritime War Emergency Board Decisions to operations in the Southwest Pacific Area. This office was advised that the decisions issued by the Board were designed primarily to cover commercial operations, and that since the operations in that area were of a quasi-military nature, the proposed practice of paying a flat 100% bonus, in lieu of all other types of bonuses authorized by the Board, would not be in conflict with the Board's Decisions or prevailing practice.

Operations of small boats assigned to the Panama Canal Department evidence the desirability of implementing a similar practice in view of the similarity of operations between the Panama Canal Department and the Southwest Pacific Area. It is proposed that a flat 75% bonus be paid to crew members employed on all such boats which are permanently assigned to the Panama Canal Department in all cases where such vessels are engaged in operations involving the regular and continuous transmitting through the Canal on both the Atlantic and Pacific sides. Such bonus provisions would be applicable in all those cases where such boats regularly make ports of call in the area as far west as the Galapagos Islands, as far east as Recife including all the northern ports along the northern coastwise boundaries of Central and South America, and as far

north as the northern boundaries of the Caribbean Sea and the West Indies as now defined in your Decisions.

Based upon the nature of the operations herein described, therefore, decision of the Board is requested as to whether the proposal outlined above would be in accord with the Decisions of the Maritime War Emergency Board governing the payment of war bonuses, and whether there is any comparable prevailing practice contrary thereto.

Your cooperation in this matter is indeed appreciated.

Sincerely,

ALEXANDER COREY,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)

October 15, 1943.

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

This is in response to your letter of September 25, 1943, concerning the operation of certain small Army vessels in the Panama Canal Zone Area.

You state that the operations involved concern the same special type of small vessel being operated in the Southwest Pacific and that the operations are virtually the same. The Board recognizes the fact that there are no comparable commercial operations in the area. The Board also recognizes that the Army is not a signatory to the Statement of Principles, and therefor, that its decisions would not be binding on the Army.

Sincerely yours,

ERICH NIELSEN,
Secretary.

War Department, Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C.

6 December 1943.

Maritime War Emergency Board,
Department of Commerce Building,
Washington, D. C.

Attention: Mr. J. G. Baldwin

Gentlemen:

Present military operations in the European Theater require the immediate permanent assignment of small vessels to be crewed by civilian marine personnel. The operations of such vessels will be quasi-military in nature and will be confined primarily to short coastal voyages.

In view of present combat activities in that area, it is essential that administration of personnel matters be kept to an absolute minimum consistent with operating requirements. It is, therefore, proposed to pay a flat 100% increase in compensation in lieu of any other applicable bonuses of any other character.

In that connection, your attention is invited to the fact that your previous informal decisions authorizing a similar practice in the Southwest Pacific Area and the Panama Canal Department recognized that there were no comparable commercial operations in those areas which would conflict with such practices. Your attention is further invited to the fact that operations of the War Department vessels in the European Theater will not be commercial in nature and the vessels will be of a type and class in no wise comparable to merchant vessels.

It is the desire of the Chief of Transportation to follow the prevailing maritime practices as reflected by the Decisions of the Maritime War Emergency Board in all cases where permitted by statutes pertaining to civil service employees. It is understood that the Maritime War Emergency Board Decisions 2A and 4A are not applicable to operators of small craft such as those to be assigned to the European Theater of Operation. Nevertheless, it is the policy of this office to implement only such practices which will not conflict with those prevailing in the maritime industry.

Your decision is therefore respectfully requested as to whether there are any comparable commercial operations in the European Theater of Operations on the type of vessel

and the type of mission to which the War Department vessels and crews will be assigned. Your prompt decision in this matter will greatly assist this office in determining the adaptability of the proposed method of effecting bonus payments to local prevailing practice.

Sincerely,

ALEXANDER COREY,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)

December 8, 1943.

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

This will acknowledge your letter of December 6, 1943, relative to certain operations of small vessels by the War Department in the European Theater of Operations. You state that the operations involved cover the same special type of small vessels operated by you in the Southwest Pacific and the Panama Canal Areas referred to in your letters to us of August 5 and September 25, 1943. Decisions 2 A and 4 A of the Board apply to small vessels operated by Signatories of the Statement of Principles except where such operations are conducted wholly or principally within inland waters. The Board recognizes, however, that there are no comparable commercial operations in the European Theater of Operations on the type of vessel and the type of mission to which you advise the War Department vessels and crews are to be assigned. The Board also recognizes that the War Department is not a Signatory to the Statement of Principles and that, therefore, the Board's Decisions would not be binding on the War Department.

Sincerely yours,

ERICH NIELSEN,
Secretary.

War Department, Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C.

December 9, 1943.

Mr. J. G. Baldwin,
Maritime War Emergency Board,
Department of Commerce Building,
Washington, D. C.

Dear Mr. Baldwin:

This will confirm telephone conversation had this date with Captain Rothouse of this office with respect to the letter addressed to the Maritime War Emergency Board, dated December 6, 1943, and the reply thereto, dated December 8, 1943. It is understood that the reference to the European Theater of Operations in your reply was intended to embrace the Mediterranean Area and the waters of North Africa.

Inasmuch as the operations described in the letter from this office will be conducted in the waters of Africa as well as Europe, your decision is again respectfully requested as to whether the reply of December 8, 1943, which recognizes that there are no exact comparable commercial operations, may be construed as applying to the waters of Africa as well as the waters of Europe.

Your cooperation in this matter is indeed appreciated.

Sincerely,

Alexander Corey,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)

December 10, 1943.

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

This will acknowledge your letter of December 9, 1943, referring to the reference to the European Theatre of Operations as covered by our letter of December 8, 1943 on small vessel operations to be conducted by you.

This will confirm your understanding that in referring to the European Theatre Operations the Mediterranean Area and the waters of North Africa are included.

Sincerely yours,

ERICH NIELSEN,
Secretary.

APPENDIX E

United States District Court, Southern District of California, Central Division

Danny Raymond Jentry, Libelant

v.

United States of America, Respondent

In Admiralty No. 5816-WM

Findings of Fact and Conclusions of Law

This cause having duly come on to be heard before the Honorable Wm. C. Mathes, Judge presiding, upon the pleadings and proofs, and having been argued and submitted to the Court for decision, the Court after due deliberation having rendered its decision directing a decree dismissing the Amended Libel herein on the merits with costs to the respondent, United States of America, the Court now makes the following

Findings of Fact

I

That at all times mentioned in the Amended Libel the United States of America was the owner and operator of the following named United States Army Transports and Tugs: FP 143, H 9, C 35884, ST 386, ST 408 and TP 103.

II

That the said libelant was employed by the United States of America as an able-bodied seaman in the Army Transport Service for a period of one year commencing April 6, 1944, pursuant to a written contract executed by the libelant, Danny Raymond Jentry, and the respondent, United States of America, dated April 6, 1944, and provided in paragraph 4 thereof as follows:

> "The Employee shall work whatever hours are required and overtime compensation, if any, may be allowed for work performed on Sundays, Saturday afternoons, holidays, or for extra hours during any day in excess of that normally considered a working day, only provided that payment for such overtime is in accord with the local prevailing practice. It is hereby agreed and understood, however, that the prob-

able performance of such extra work by the Employee has been taken into consideration in establishing the wages specified above."

III

That the libelant entered into his duties under said contract on the 6th day of April, 1944 and was assigned to the Southwest Pacific Theatre of Operations, which is West of the 180th Meridian, and did perform his duties under said contract in said area until and including the 30th day of March, 1945 for a period of 359 days.

IV

Having found as hereinabove set forth, it is true that the respondent during all of the times of employment of the libelant, or otherwise, did not agree to or indicate in any manner that it would pay overtime for the services rendered by the libelant, and that the regulations of the Army Transport Service did not provide for the payment of overtime, nor was there any local prevailing practice in the area in which libelant served for paying overtime on the types of vessels upon which libelant performed his services herein; that the hours of overtime which libelant claims to have worked under the said contract were contemplated and taken into consideration in establishing the wages specified in said contract; that the said terms and provisions are unambiguous, and libelant understood all the terms and provisions of said contract prior to the execution thereof and during the rendering of the services by him thereunder.

V

That the libelant is not entitled to recover any sum whatsoever from the respondent.

VI

That at all times mentioned in the Amended Libel the libelant was an American seaman and within the designation of a person entitled to sue without furnishing bond for, or prepayment of, or making any deposit to secure costs for the purpose of prosecuting suits in admiralty.

VII

That the libelant made no claim and proffered no evidence in support of paragraph Seventh of the Amended Libel,

and each and all of the allegations therein contained are not true.

VIII

It is true that the libelant at all times mentioned in his Amended Libel, and up to and including the time of the filing of this suit, was a resident of the Southern District of California within the jurisdiction of this Court.

IX

That each and all of the allegations set forth in libelant's Amended Libel inconsistent with these findings of fact are untrue.

Conclusion of Law

1. Libelant is not entitled to recover from the respondent, United States of America, and the Amended Libel should be dismissed upon its merits.

2. Respondent, United States of America, is entitled to judgment and decree for its costs of suit incurred.

Dated: January 31, 1949.

WM. C. MATHES,
United States District Judge.

APPENDIX F

Unreported Decisions Applying the Tucker Act Exceptions to Suits by Civil Service Employees

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United States District Court, Eastern District of Arkansas, Western Division

David J. Brown, et al., plaintiffs-intervenors

v.

United States of America, defendant

L. R. Civil Action 1772

Appearances: K. E. Phipps and Mrs. Neva B. Talley, of Little Rock, Arkansas, for Plaintiffs-Intervenors. James T. Gooch, United States Attorney and Mr. G. D. Walker, Assistant U. S. Attorney, for the Defendant.

Trimble, Judge.

The plaintiff and intervenors, hereinafter referred to as plaintiffs, bring this action to recover overtime payments which they allege are due them from the United States Government. They rely upon the Tucker Act, 28 U.S.C. 1346(2), formerly 28 U.S.C. 41 (20).

Briefly the facts are that during the parts of the years 1941, 1942 and 1943, while the United States had control and management of the municipal Airport at Little Rock, and operated it under the direction of the U. S. Army, the plaintiffs were employed as civilian guards with civil service status as "War Service Indefinite" employees. It is their contention that during a portion of the years named above they received only an annual salary although they were required to and did work extra hours for which they received no pay.

Among other defenses it is the contention of the government that the plaintiffs were officers of the United States within the exception to the Tucker Act in 28 U.S.C. 1346, (d) (2), and that the district court has no jurisdiction of this action. That section of the statute reads:

> "(d) The district courts shall not have jurisdiction under this section of: . . .
>
> (2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States."

In Sect. 2 of Article II of the United States Constitution provision is made for the appointment of officers of the United States. After setting forth the method and authority for appointing major officers it provides:

> "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the Heads of Departments."

The plaintiffs were not appointed by the President, nor by a court of law, and to be officers must of necessity have been appointed by the head of a department. In the case of United States v. Germaine, 99 U. S. 508, 510, the Supreme Court held:

> "The term Head of A Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, War, who is a member of the Cabinet."

Neither the importance of the task, the amount of compensation, nor the duties to be performed is determinative of whether the employee of the government is an "officer" within this exception in the Tucker Act. Surrowitz v. United States, 80 Fed. Supp. 718, note 2. In Burnap v. United States, 252 U. S. 512, 516, the Supreme Court said:

> "The distinction between officer and employee in this connection does not *reat* upon differences in the qualifications necessary to fill the positions or in the character of the services to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. (Citing cases)."

Pursuant to the provisions of the Sect. 2, Art. III of the Constitution, quoted hereinbefore, the Congress provided statutory authority for appointments in the Act of 26 June 1930 (46 Stat. 817; 5 U.S.C. 43). This act authorized employment of such number of employees as may be appropriated for by Congress from year to year, with the further proviso:

> "That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to

employ such persons for duty in the field service of the department or establishment.''

Adams Field, the municipal airport at Little Rock, at which plaintiffs were employed, (previously known as the Quartermaster Motor Supply Depot and as the Little Rock Ordnance Depot), was a field installation of the War Department. The positions of civilian guard personnel at such installations were filled by appointment under War Service Regulations V published in War Department Administrative Memorandum No. 27, April 30, 1942, and preceding regulations. The plaintiffs were appointed at a stated annual salary to be paid out of regular appropriations made available to the Department, and they were assigned to duties prescribed by competent authority.

The War Service Regulations were promulgated by the Civil Service Commission under authority conferred upon it by Executive Order No. 9063. Such regulations provided for two types of service for persons appointed after March 15, 1942: * * * (2) those which were denominated as ''indefinite'' appointments which were without limit except they could not continue beyond ''the duration of the war and six months thereafter.'' Type (1) of service not being applicable here.

Under the authority of this, other and later regulations the plaintiffs were employed by the United States, and worked under the control and direction of a Department of the United States Army and the War Department. As evidence of this the original plaintiff, David J. Brown has introduced as an exhibit, the letter appointing him as ward attendant, and which is signed by an officer who signs as a Lieutenant Colonel, Medical Corps, Surgeon. There is also in evidence a document showing his transfer from such ward attendant to patrolman, a position similar to that in which he alleges his claim for overtime arose. This document bears the notations: ''Action taken under War Service Regulation IX, Section 6c * * * By order of the Secretary of War.'' To all intents and purposes the intervenors were appointed under similar regulations if not the same. There can be no doubt but that they were appointed by authority of the Secretary of War, who is ''The Head of a Department.''

This view is supported, by any number of cases decided by the Supreme Court, Courts of Appeal and District Courts, many of which will be found cited and discussed very ably in Kennedy v. United States, 146 Fed. 2d, 28.

The plaintiffs lay great stress upon the holding of the

Supreme Court in United States v. Hartwell, supra, wherein it is said:

> "An officer is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."

The court, of course, agrees fully with this statement, yet the court cannot give to these terms the exact and fine distinction claimed for them. It is sufficient to say that these plaintiffs held their positions by appointment of government, for an indefinite period (the war and six months thereafter), which actually lasted for several years, were assigned to duties which had been prescribed by competent authority, and were paid a fixed annual salary.

The claims of the plaintiffs are of the character of claims dealt with by the Tucker Act of March 3, 1887, 28 U.S.C. 1346 (2), and would be maintainable in the district courts, if Congress had not seen fit to expressly withhold consent to sue the government on such claims. This exception, if applicable, is applicable to every grade of employee, and as the court must hold these plaintiffs to be officers of the United States within the exception, the exception will apply to them. United States v. Hartwell, supra; Kennedy v. United States, supra. This last case contains a very full and able discussion of the cases sustaining this view.

The court being of the opinion that the plaintiffs were officers of the United States, within the purview of Section 2 Article II of the Constitution, and within the exception in the Tucker Act, 28 U.S.C. 1346(d)(2), the court is without jurisdiction to hear the action.

There are other questions raised by the motion for summary judgment, and arguments advanced, but in view of the decision reached by the court, the court will not pass upon the other issues.

Counsel for the government will prepare praecipe for summary judgment in accordance with this memorandum and the rules of court.

Filed June 23, 1949. Grace Miller, Clerk. By H. B.-D.C.

United States District Court, Western District of New York

Dr. Neatha V. Bolin, plaintiff,

v.

United States of America, defendant

Civil Action, No. 3737

Appearances: Wilbur F. Knapp, of Bath, N. Y., for plaintiff. George L. Grobe, U. S. Attorney (James R. Privitera, of counsel), both of Buffalo, N. Y., for defendant.

Knight, Chief District Judge:

Plaintiff in his complaint alleges that he is a resident of Bath, N. Y. and brings this action under Tucker Act, 28 U.S.C., sec. 41(20), to recover overtime pay under 50 U.S.C., appendix, secs. 1401-1415; that he was employed by defendant as neuropsychiatrist at Veterans Facility, Bath, N. Y. and there rendered services as "Officer of the Day" in excess of 48 hours a week for which he was not paid nor given compensatory time off from May 11, 1943 to and including February 22, 1944, a total of 352 hours, for which he should have been paid $531.66; that due and legal claim for said pay was filed with General Accounting Office and denied on or about December 18, 1947. He demands judgment for $531.66, with interest from February 23, 1944.

The action was commenced April 11, 1948. Defendant has moved to dismiss the complaint (1) for lack of essential allegations required by 28 U.S.C., sec. 265; (2) that plaintiff is an "officer" within meaning of Tucker Act rather than an "employee" and therefore this court has no jurisdiction.

Annexed to notice of motion is the affidavit of George H. Sweet, Ass't Administrator for Personnel, Veterans' Administration, Washington, D. C., verified May 16, 1949, who narrates the phases of plaintiff's employment and concludes:

"By virtue of his appointment in the Veterans Administration, as aforesaid, Dr. Bolin is considered as an officer of the United States within the meaning of Section 1346(d) (2), Title 28, United States Code Annotated."

Plaintiff, in opposition, submits an affidavit, verified by him June 1, 1949, in which he alleges that from January

16, 1939, to February 23, 1943, he was employed by defendant at said hospital as "ward physician. I was in Civil Service status at the time * * * and was not in any sense of the word actually or constructively an officer of the United States. On February 23, 1943, I was commissioned as Major in the Army * * * and continued to serve as such for the balance of time pertinent to this cause of action. I had no commission in the Veterans Administration and was strictly under the rules and regulations as laid down by the Civil Service Commission and was subject to all of the laws governing overtime payment for Civil Service employees." In his annexed Exhibited A, plaintiff sets forth the details of overtime from May 11, 1943, to February 22, 1944, totaling 352 hours. He states the hourly rate of overtime pay in excess of 48 hour week was $1.51041 and that amount of overtime compensation due is $531.66432.

Defendant, in its brief, asserts: "The brief will deal solely with the question of jurisdiction. No attempt will be made to argue the merits or demerits of the plaintiff's claim. Briefly, it is the contention of the government that, if the plaintiff has any claim at all, he should commence action in the proper forum, to wit, the Court of Claims and not the United States District Court. The government's position is that the plaintiff is in the proper church but the wrong pew."

28 U. S. C., sec. 41(20)—the Tucker Act—repealed by Act June 25, 1948, effective September 1, 1948, provided in part:

> "Nothing in this paragraph shall be construed * * * as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purposes by persons claiming as such officers * * *."

The same limitation is found in the revised Judicial Code—28 U.S.C., sec. 1346 (d)(2)—which became effective September 1, 1948.

Was plaintiff an "officer of the United States" during the time specified in his complaint?

Title 1, section 1 of U. S. C., dealing with General Provisions, declares: "In determining the meaning of any Act of Congress, unless the context indicates otherwise—'officer' includes any person authorized by law to perform the duties

of the office.'' (Amendment of July 30, 1947). Prior to the amendment, the section read: ''In determining the meaning of any Act or resolution of Congress * * * the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense.''

These definitions are incomplete because the term ''office'' is left undefined.

In United States v. Mouat, 124 U. S. 303, decided in 1887, the court said:

> ''What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in United States v. Germaine, 99 U. S. 508. In that case, it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. We do not see any reason to review this well established definition of what it is that constitutes such an officer.'' p. 307.

In that case, a paymaster's clerk, appointed by a paymaster in the navy with the approval of the Secretary of the Navy, was held not to be an officer entitled to traveling expenses.

War Overtime Pay Act of 1943, being 50 U. S. C. Appendix, secs. 1401-1415, terminated on June 30, 1945. Sec. 1401 thereof provided:

> ''This Act shall apply to all civilian officers and employees (including officers and employees whose wages are fixed on a monthly or yearly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose * * *.''

Certain exceptions are listed not pertinent to this case.

Section 1402 provided for the computation of overtime compensation. The Act, however, did not declare in what tribunal such claims might be brought nor did it define the terms "civilian officers", "officers" or "employees."

From the aforesaid affidavit of George H. Sweet, submitted by defendant, it appears that plaintiff, on January 16, 1939, "was probationally appointed as Associate Medical Officer, Grade P & S-3, $3200 per annum, from a certificate of Civil Service eligibles, for a course of training at the Veterans Administration Hospital, Hines, Illinois * * * by Frank T. Hines, Administrator of Veterans Affairs. Thereafter, effective June 16, 1939, (he) was transferred to the Veterans Administration Hospital, Coatesville, Pennsylvania and, effective March 16, 1940, he was promoted to P & S-4, $3800 per annum. On October 1, 1940, he was transferred to the Veterans Administration Hospital, Bath, New York. On February 9, 1942, he was promoted to Senior Medical Officer, P & S-4, $4600 per annum. He remained in this position at the same grade and salary until on March 21, 1944, he was commissioned in the Medical Corps, Reserve, of the United States Army, and assigned to and continued to serve at the Veterans Administration Hospital at Bath, New York, as a psychiatrist with the rank of Major and later with the rank of Lieutenant Colonel."

The Veterans' Administration was established by Executive Order No. 5398, July 21, 1930, pursuant to authority granted by 28 U. S. C. sec. 11. Section 11a provides:

> "There shall be at the head of the Veterans' Administration an administrator to be known as the Administrator of Veterans' Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate."

38 U. S. C., sec. 426, provides in part:

> "All officers and employees of the Veterans' Administration shall perform such duties as may be assigned them by the Administrator. All official acts performed by such officers or employees specially designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person."

No distinction is made between officer and employee nor are the terms defined.

The U. S. Supreme Court in Burnap v. United States, 252 U.S. 512, decided in 1920, holding that a landscape architect in the Office of Public Buildings and Grounds is not an officer but an employee, said:

> "The distinction between officer and employee in this connection does not rest upon difference in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto." p. 516.

Defendant in its brief declares: "No reported case involving a claim for fees, salary or compensation under the Tucker Act has dealt with a claim by a person holding a position in an independent department of the government not headed by a cabinet member." Plaintiff's counsel in his brief admits that the only case he could find that is absolutely in point is an unpublished memorandum of U. S. District Judge Matthew M. Joyce, dated March 25, 1945, of U. S. District Court, District of Minnesota, Fourth Division in the case of "Dr. Edward F. Ducey, Plaintiff, v. United States of America, Defendant." In that case Dr. Ducey sued under the War Overtime Pay Act of 1943 and was awarded $60.42 for 40 hours overtime. The memorandum states that defendant "moved to dismiss on the ground that the plaintiff was an officer of the United States and that therefore this court had no jurisdiction under the Tucker Act." The court, however, in the memorandum did not discuss this objection. It appears that no appeal was taken from the decision.

Article II, sec. 2 of the U. S. Constitution "confers upon the President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law or in the heads of departments (6 Op. Atty. Gen. 1)." Burnap v. United States, 252 U. S. 512, 514-515, supra.

The Constitution did not establish any department or define the term. It did not provide for a cabinet. There are now 11 Departments in the Executive Branch of our national Government (5 U.S.C. sec. 1) but only 9 heads of departments having cabinet status. Since July 26, 1947,

there are separate Secretaries of the Departments of the Army, Navy and Air Force but they have no cabinet rank, that being reserved to the Secretary of Defense. It would follow from the definition in United States v. Mouat, 124 U. S. 303, supra, that commissioned officers of any of the three military departments are not "officers of the United States".

In United States v. Germaine, 99 U. S. 508, it was held that the Commissioner of Pensions was not the head of a department within the meaning of Art. II, sec. 2 of the U. S. Constitution and that a civil surgeon appointed by him was not an officer of the United States.

Some recent cases, however, give the term "head of a department" a broader connotation. It is also given a broader meaning in 5 U.S.C., sec. 662.

In United States v. Marcus (C.A.A. 3d), 166 F. 2d 497, appellant-defendant, supervisory investigating officer in the office of OPA, was indicted for accepting a bribe. It was held that he was an officer of the United States. The court said:

> "We agree to the proposition that an officer of the United States is one appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law or the head of some executive department of the government. See Art. II, section 2, of the Constitution. The defendant was not appointed by the President, hence the immediate inquiry is whether the party appointing him was the head of a department. * * * In the instant case the steps are as follows: The President was given power under the Emergency Price Act to appoint the Price Administrator, by and with advice and consent of the Senate; the Price Administrator was to direct the Office of Price Administration set up by Congress, and to receive a set salary; he is given power by the Act to appoint assistants to carry out his duties. Defendant, as an appointee thereunder, is an officer of the United States. The OPA was set up as an emergency department of the Executive with far-reaching control, and it is our opinion that it constitutes an executive department of government within the requirements herein mentioned. * * * The cases of United States v. Germaine, supra (99 U. S. 508), and Burnap v. United States, 252 U. S. 512 * * *, are distinguishable, for in both of them the defendants were clearly employees and not officers." p. 503.

The Emergency Price Control Act of 1942 did not specifically designate the OPA an executive department. 38 U.S.C., sec. 11, designates the Veterans' Administration as an "establishment."

In United States v. Holmes (C.C.A. 3d), 168 F. 2d 888, another OPA investigator was indicted and tried for extortion and bribery. The court, affirming the conviction, said:

> "Defendant has contended that an investigator of the OPA is neither an officer of the United States nor a person acting on behalf of the United States in an official capacity within the meaning of the bribery statute. Criminal Code sec. 117, 18 U.S.C.A. sec. 207. The mere recital of this argument is enough to discredit it." p. 891.

Plaintiff, in the instant case, was appointed by Frank T. Hines, Administrator of Veterans' Affairs, who was the head of a department. "The term 'department' means an executive department of the United States Government, a governmental establishment in the executive branch of the United States Government which is not a part of an executive department. * * * The term 'the head of the department' means the officer or group of officers in the department who are not subordinate or responsible to any other officer of the department." 5 U.S.C. sec. 662.

A physician is ordinarily deemed an independent contractor and not an employee. Metzger v. Western Maryland Ry. Co. (C.C.A. 4th), 30 F. 2d 50, 51. See Matter of Turel v. Delaney, 171 Misc. (N.Y.) 962. As physician, he exercises an independent calling.

I therefore conclude that plaintiff, during the period for which he claims overtime compensation, was an "officer of the United States" within the meaning of the Tucker Act—28 U.S.C. sec. 41 (20), now 28 U.S.C. sec. 1346 (d)(2). Plaintiff's complaint is hereby dismissed.

Filed December 1, 1949.

District Court of the United States, Middle District of Alabama, Northern Division

Claud W. Owens, plaintiff,

vs.

United States of America, defendant

Civil No. 354-N

Kennamer, Judge:

Plaintiff, Claud W. Owens, brought this suit against the United States of America, for wages or salary he alleges the defendant is due to pay him for overtime work while he was a civilian employee of the War Department of the United States.

The plaintiff invokes the jurisdiction of this court under section 41, subdivision 20, of the United States Code Annotated.

The defendant, United States of America, by the United States Attorney for this district, filed its motion to dismiss the said cause out of this court for lack of jurisdiction, averring that suit is for fees, salary, or for compensation for official services of officers of the United States, as is prohibited in subdivision 20 of said section.

Oral argument on the motion to dismiss was heard by the court, and certain documentary evidence exhibited to the court, from which the court finds that this plaintiff and others were employed by authority of the Secretary of War, after being found to possess proper qualifications as the result of a Civil Service examination as fire fighters, a position authorized by the Secretary of War. The Plaintiff was appointed at a stated annual salary and subscribed to the usual oath of office.

It appears to this court that this case, as made out by plaintiff's complaint and the evidence before the court, comes clearly within the decision of the United States Circuit Court of Appeals, 5th circuit, in the case of Kennedy v. United States, 146 F. 2d 26.

It is, therefore, ordered, adjudged and decreed that the motion to dismiss the said complaint is granted, and said complaint is dismissed, and the plaintiff is taxed with the cost of this suit, for which execution may issue.

Filed December 12, 1945. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy.

United States District Court, Southern District of California, Central Division

Dr. James A. Winsberg, plaintiff

v.

United States of America, et al., defendants

No. 9662-WM Civil

Order on Defendants' Motion to Dismiss

This cause having heretofore come before the court for hearing on the motion of defendants to dismiss the complaint for want of jurisdiction over the persons of the defendants; and the motion having been heard and submitted for decision; and it appearing to the court:

(a) that the plaintiff invokes the jurisdiction of this court under the provisions of the Tucker Act of March 3, 1887 [28 U.S.C. § 1346, formerly 28 U.S.C. § 41(20)];

(b) that the plaintiff seeks by this action to recover compensation for his official services as an "officer of the United States" within the Meaning of the Tucker Act [*United States* v. *Hartwell,* 73 U. S. 385, 393 (1867); *Kennedy* v. *United States,* 146 F. (2d) 26 (C.C.A. 5th, 1944); *Oswald* v. *United States,* 96 F. (2d) 10 (C.C.A. 9th, 1938); cf. *United States* v. *Marcus,* 166 F. (2d) 497, 503 (C.C.A. 3rd, 1948)]; and

(c) that in the Tucker Act the Congress has expressly withheld consent to sue the Government in the court on claims for "fees, salary, or compensation for official services of officers of the United States" [28 U.S.C. § 1346 (d)(2)];

defendants are accordingly entitled as a matter of law, to a judgment dismissing this action for want of jurisdiction of this court over the persons of the defendants;

It Is Now Ordered:

(1) that defendants' motion to dismiss, filed July 5, 1949 be and is hereby granted; and

(2) that counsel for defendants submit judgment dismissing this action for want of jurisdiction over the persons of the defendants, pursuant to local rule 7 within five days.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail on the attorneys for the parties appearing in this cause.

November 30, 1949.

WM. C. MATHES,
United States District Judge.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 882095 623

No. 12401

United States Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FOSTER TRANSFER COMPANY, a Corporation,

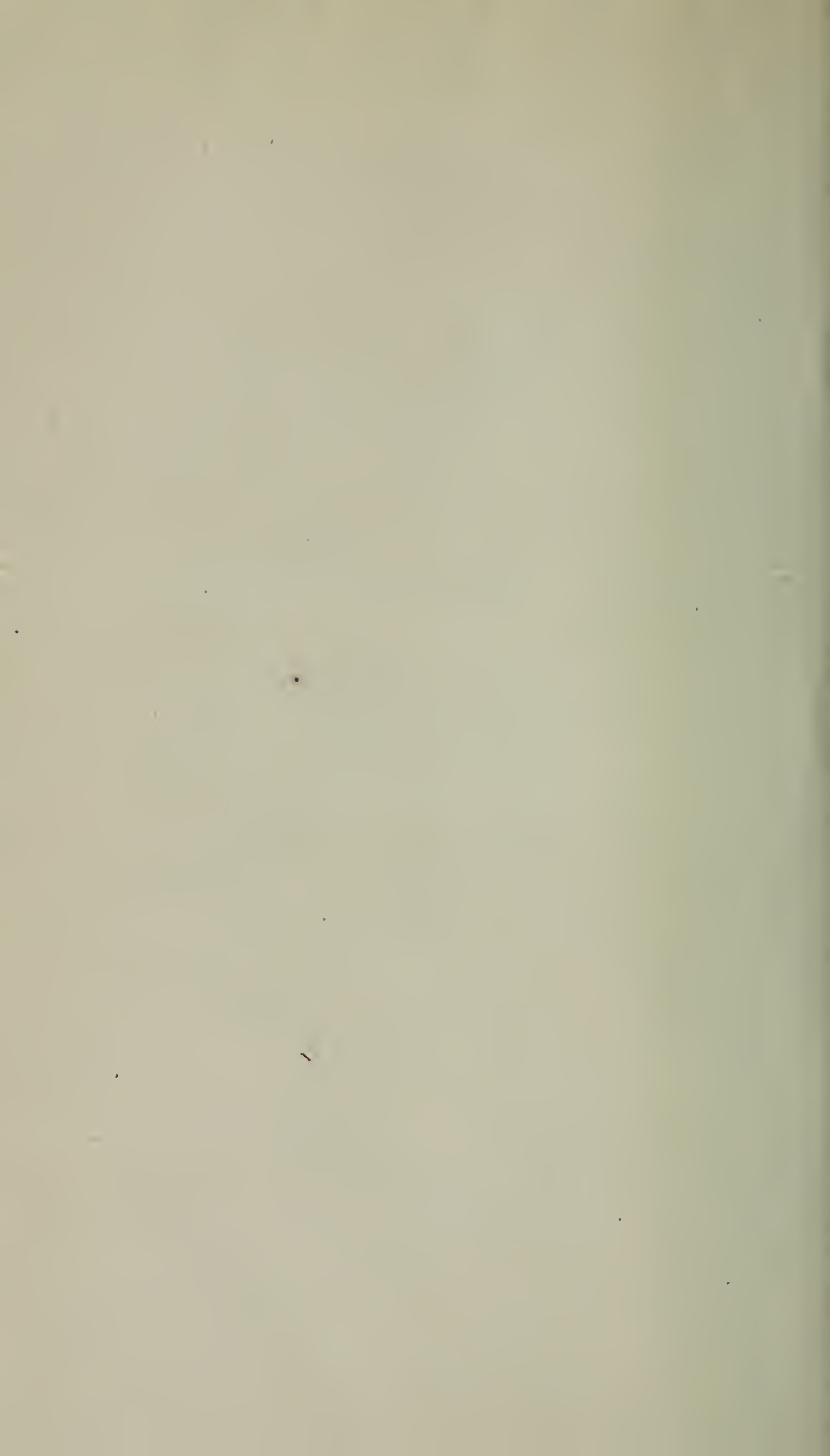
Appellee.

Transcript of Record

**Appeal from the United States District Court,
Western District of Washington,
Northern Division.**

FILED
FEB 2 - 1950
PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.



No. 12401

United States Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FOSTER TRANSFER COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS and
VAUGHN E. EVANS,
Attorneys for Appellant,
1017 United States Court House,
Seattle 4, Washington.

HAROLD A. SEERING of
MAXWELL, SEERING, JONES & MERRITT.
Attorneys for Appellee,
4454 White-Henry-Stuart Bldg.
Seattle 4, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1787

FOSTER TRANSFER COMPANY, a Washington Corporation,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action against the defendant, alleges:

I.

This action arises under the Act of Congress of March 3, 1887, C. 359 24 Stat. 505; U. S. C. Title 28 Section 41 (20). That the action is one upon an express contract and the amount in controversy does not exceed Ten Thousand ($10,000.00) Dollars, as hereinafter more fully appears.

II.

That plaintiff is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, King County, Washington. That it has paid its annual license fee last past due said State.

III.

That the Treasury Department is an executive department of the United States, and that within such department is established the Procurement Division, which is charged by law with the procurement of contracts for services and supplies for the United States. That William B. Ihlanfeldt is regional director of the United States Treasury Department, Procurement Division for Region XI, with its headquarters in Seattle, Washington.

IV.

That on the 26th day of June, 1945, the United States Treasury Department Procurement Division, entered into a contract with plaintiff, the same being Contract No. T11 RP-156. The said contract provided for the performance by plaintiff for the United States Treasury Department Procurement Division, of certain transportation services therein specified, the effective period of the contract being July 1, 1945 to and including June 30, 1946.

V.

That plaintiff fully and faithfully performed all things required of it under the provision of said contract. That notwithstanding such performance by plaintiff, the defendant, through its Treasury Department Procurement Division, William B. Ihlanfeldt, Regional Director for Region XI,

wrongfully, arbitrarily and without cause, cancelled said Contract No. T11 RP-156, effective February 28th, 1946. That as a result of the wrongful action of the defendant, plaintiff has been deprived of its profits for the unexpired portion of such contract, and as a result thereof has been damaged in the sum of Five Thousand ($5,000.00) Dollars.

VI.

That plaintiff is the sole owner of the claim herein sued upon, and that no assignment of such claim or any interest therein has been made to any person. That no other action has been had on said claim in Congress or by any of the defendants.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Five Thousand ($5,000.00) Dollars, together with its costs and disbursements herein to be taxed.

MAXWELL, SEERING & JONES,

By /s/ MAXWELL, SEERING & JONES,

Attorneys for Plaintiff.

State of Washington,
County of King—ss.

H. L. Doolittle, being first duly sworn upon his oath, deposes and says:

That he is President of the above named plaintiff, Foster Transfer Company, a Washington Cor-

poration; that he has read the within and foregoing Complaint, knows the contents thereof and believes the same to be true.

/s/ H. L. DOOLITTLE.

Subscribed and Sworn to before me this ...... day of December, 1946.

/s/ HAROLD A. SEERING,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 5, 1947.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendant: United States of America.

You are hereby summoned and required to serve upon Maxwell, Seering & Jones, plaintiff's attorneys, whose address is 4454 White-Henry-Stuart Building, Seattle 1, Washington, an answer to the complaint which is herewith served upon you, within sixty (60) days after service of this summons upon you, exclusive of the day of service. If you fail so to do, judgment by default will be taken against you for the relief demanded in the complaint.

MILLARD P. THOMAS,
Clerk of Court.

[Seal] By /s/ PERCY MADDUX,
Deputy Clerk, U. S. District Court, Western District of Washington.

Dated: April 5, 1947.

Affidavit of mailing attached.

Return on service of writ acknowledged.

[Endorsed]: Filed April 17, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled cause and for answer to the Complaint on file herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations of paragraph I.

II.

The defendant alleges it does not have sufficient information to form a belief as to the truth of the allegations in paragraph II and therefore denies the same.

III.

Defendant admits the allegations of paragraphs III and IV.

IV.

Defendant denies the allegations of paragraph V and specifically denies that the plaintiff has been damaged in the sum of $5,000 or in any other sum whatsoever.

V.

Answering paragraph VI the defendant alleges it does not have sufficient information to form a belief as to the truth of the allegations therein and therefore denies the same.

And by way of Further Answer and Affirmative Defense, the defendant alleges as follows:

I.

That on the 26th day of June, 1945, the defendant, acting by and through the Procurement Division, Treasury Department, entered into Contract No. T11rp-156 with plaintiff.

II.

That Article 21 of the Special Conditions of the said contract provides as follows:

"21. The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause."

III.

That Article 3 of the General Provisions of said contract provides as follows:

"3. Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

IV.

That subsequent to the execution of the said contract and on or about the 26th day of June, 1945, the plaintiff herein began the performance of said contract; that the plaintiff did not fully and faithfully perform and comply with the provisions

of the said contract and that thereafter and on February 20, 1946, the said contract for good and sufficient cause was cancelled by the Contracting Officer, William B. Ihlanfeldt, Regional Director, Procurement Division, Treasury Department, Seattle, Washington, cancellation to be effective on February 28, 1946; that plaintiff on or about March 8, 1946, filed a notice of appeal with the Secretary of the Treasury appealing from the action of the Contracting Officer in cancelling the said contract; that on July 11, 1946, the plaintiff's appeal to the Secretary of the Treasury was denied and the action of the Contracting Officer in cancelling said contract was sustained; that pursuant to provisions of said contract, the plaintiff is not entitled to recover any sums of money whatsoever from the defendant.

Wherefore, having fully answered the complaint of the plaintiff herein, defendant prays that the same be dismissed and that it recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

State of Washington,
County of King—ss.

Frank Pellegrini, being first duly sworn, on oath deposes and says:

That he is one of the attorneys of record for

the defendant herein and as such makes this verification for and on its behalf as he is authorized so to do; that he has read the within and foregoing answer, knows the contents thereof, and believes the same to be true.

/s/ FRANK PELLEGRINI.

Subscribed and sworn to before me this 7th day of June, 1948.

[Seal] /s/ VAUGHN E. EVANS,
Notary Public in and for the State of Washington, residing at Longview.

Receipt of copy acknowledged.

[Endorsed]: Filed June 8, 1948.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for reply to the affirmative defense in defendant's Answer, admits, denies and alleges as follows:

I.

Replying to Paragraph I, admits the allegations thereof.

II.

Replying to Paragraph II, admits the same.

III.

Replying to Paragraph III, denies the allegations of this Paragraph.

IV.

Replying to Paragraph IV, admits that plaintiff undertook the performance of said contract and did faithfully perform, and that said contract was thereafter cancelled; that plaintiff filed a Notice of Appeal as therein alleged, which Notice of Appeal was denied.

Otherwise, plaintiff denies each and every remaining allegation in said paragraph contained.

MAXWELL, SEERING,
JONES & MERRITT,
Attorneys for Plaintiff.

/s/ HAROLD A. SEERING.

State of Washington,
County of King—ss.

Harold A. Seering, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the plaintiff herein and as such makes this verification for and on its behalf as he is authorized so to do; that he has read the within and foregoing Reply, knows the contents thereof, and believes the same to be true.

/s/ HAROLD A. SEERING.

Subscribed and Sworn to before me this 29th day of July, 1948.

[Seal] /s/ ELTON B. JONES,
Notary Public in and for the State of Washington residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION OF LAW

This matter having come on this day before the undersigned Judge of the above entitled court, plaintiff appearing by Harold A. Seering, its attorney; defendant appearing by J. Charles Dennis and Vaughn E. Evans, its attorneys; and the action having heretofore been heard and tried before the undersigned on the 2nd and 3rd days of August, 1949, witnesses having been sworn and testimony adduced and thereafter on the 5th day of August, 1949, the court having heard the argument of counsel and having orally announced its decision, the court does now make the following:

Findings of Fact

This action arises under the Act of Congress of March 3, 1887, C. 359 24 Stat. 505; U. S. C. Title 28 Section 41 (20). That the action is one upon an express contract and the amount in controversy does not exceed Ten Thousand Dollars ($10,000.00), as hereinafter more fully appears.

II.

That plaintiff is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, King County, Washington. That it has paid its annual license fee last past due said State.

III.

That the Treasury Department is an executive department of the United States, and that within such department is established the Procurement Division, which is charged by law with the procurement of contracts for services and supplies for the United States. That William B. Ihlanfeldt is regional director of the United States Treasury Department, Procurement Division for Region XI, with its headquarters in Seattle, Washington.

IV.

That on the 26th day of June, 1945, the United States Treasury Department Procurement Division, entered into a contract with plaintiff, the same being Contract No. T11 RP-156. The said contract provided for the performance by plaintiff for the United States Treasury Department, Procurement Division, of certain transportation services therein specified, the effective period of the contract being July 1, 1945 to and including June 30, 1946.

V.

That the contract between the parties hereinabove referred to contains, among other provisions, the following:

"The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause."

That plaintiff entered upon the performance of its contract, hereinabove referred to, on the 1st day of July, 1945; that during the performance of the

contract defendant received several complaints as to the work performed by plaintiff. That the defendant, through William B. Ihlanfeldt, Regional Director for Region XI, Treasury Department, Procurement Division, for just cause, by letter of February 20, 1946 mailed to the plaintiff, cancelled said contract No. T11 RP-156, effective February 28, 1946.

VI.

That the period of time granted by defendant before the taking effect of the cancellation was unreasonable under the circumstances in that it did not extend sufficient time to plaintiff to protect itself against certain fixed expenses necessarily incurred to enable it to perform its contract with defendant. That these expenses consisted of trucks and warehouse leased by plaintiff and salaries of office employees whose services were no longer necessary after the cancellation of said contract. That by reason of the unreasonably short notice extended by defendant, plaintiff has been damaged in the sum of Fifteen Hundred ($1500.00) Dollars.

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
Judge.

From the Foregoing Findings of Fact, the Court Does Make the Following:

Conclusion of Law

That plaintiff is entitled to have and recover judgment against the defendant in the sum of

Fifteen Hundred ($1500.00) Dollars, together with its costs and disbursements herein to be taxed.

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ HAROLD A. SEERING,
Attorney for Plaintiff.

[Endorsed]: Filed August 15, 1949.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 1787

FOSTER TRANSFER COMPANY, a Washington Corporation,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

JUDGMENT

This matter having come on this day before the undersigned Judge of the above-entitled court, plaintiff appearing by Harold A. Seering, its attorney; defendant appearing by J. Charles Dennis and Vaughn E. Evans, its attorneys; and the action having heretofore been heard and tried before the undersigned on the 2nd and 3rd days of August,

1949, witnesses having been sworn and testimony adduced and thereafter on the 5th day of August, 1949, the court having heard the argument of counsel and having orally announced its decision, and the court having entered its Findings of Fact and Conclusion of Law, Now, Therefore,

It Is Ordered, Adjudged and Decreed that plaintiff have and recover judgment against the defendant in the sum of Fifteen Hundred ($1500.00) Dollars, together with its costs and disbursements in the sum of Fifty-One and 80/100 Dollars ($51.80).

Done in Open Court this 15th day of August, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ HAROLD A. SEERING,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 15, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Foster Transfer Company, a Washington Corporation, plaintiff herein, and to Maxwell, Seering & Jones, its attorneys:

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the Judgment entered in the above court on the 15th day of August, 1949.

/s/ J. CHARLES DENNIS,
U. S. Attorney,

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON

Appellant, United States of America, proposes on its appeal to the United States Court of Appeals for the Ninth Circuit to rely upon the following points as error:

1. The court erred in finding, concluding and adjudging that the terms of the written contract between the appellant and the appellee required the appellant to give the appellee notice of cancellation of the contract a reasonable time before the effective date of such cancellation.

2. The court erred in finding, concluding and adjudging that the period of time between the giving of the notice of cancellation of the contract by the appellant and the effective date of the cancellation was unreasonable.

3. The court erred in questioning witnesses on issues not raised by the pleadings or evidence in-

troduced by the parties and granting the appellee damages based on such testimony so adduced.

4. The court erred in finding, concluding and adjudging that the appellee recover damages against the appellant for items not mentioned in the pleadings nor raised by evidence offered by the parties.

5. The weight of the evidence is contrary to the findings of fact.

6. The conclusions of law are contrary to the law governing the subject matter of the controversy.

7. The court erred in refusing to admit appellant's Exhibit A-8 in evidence.

8. The court erred in holding the appellee was entitled to judgment against the appellant.

9. The court erred in not finding in favor of the appellant.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed November 15, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the appellant, United States of America, and designates the following as the record to be prepared on appeal in the above-entitled cause.

1. The entire transcript of proceedings.

2. All pleadings.

3. Exhibits 5, 6, A-1, A-2, A-6, A-7, A-8, A-10, A-11, A-12, and A-13.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant United States Attorney, Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1949.

In the United States District Court for the Western District of Washington, Northern Division
No. 1787

FOSTER TRANSFER COMPANY, a Washington Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Be It Remembered, that on the 2nd day of August, 1949, at the hour of 10:00 a.m., the above entitled and numbered cause came on for trial before the Honorable John C. Bowen, District Judge, at United States Federal Courthouse, in the City of Seattle, County of King, State of Washington;

The plaintiff appearing by Harold A. Seering, Esq. (of Maxwell, Seering & Jones), its attorney and counsel;

The defendant appearing by Vaughn Evans, Esq., its attorney and counsel;

Both sides having announced they were ready for trial, the following proceedings were had and testimony given, to wit:

The Court: In the case on trial, Foster Transfer Company versus United States of America, Cause Number 1787, the Court will now hear the opening statement of counsel for the plaintiff as to what the plaintiff thinks the proof will be in this case.

(Opening statement by counsel for plaintiff.)

The Court: I will hear the defendant's opening statement now or later, as you may elect.

Mr. Evans: I believe we prefer to reserve our opening statement. I do have a short memorandum of authorities which may be helpful to the Court.

The Court: That will be welcome.

Mr. Evans: I have given opposing counsel a copy of it.

The Court: Plaintiff may call its first witness.

Mr. Evans: If Your Honor please, before calling a witness, Counsel and I have agreed, I think, on practically all of the exhibits in the case and at this time we have agreed that—will you identify it, Counsel?

Mr. Seering: Yes. This is a certified copy of the contract from the General Accounting Office which bears the protestation and proper seal of that office.

This is a black on white photostat of the original [4*] contract together with the performance bond and acceptance of the bid and notice of termination and the two or three amendments to the contract. This is a complete Accounting Office file, which I believe is proper for admission in evidence without further identification.

The Court: Did you say it was a black photostat?

Mr. Seering: It is a black on white—positive rather than negative. I took special pains to procure that type.

*** Page numbering appearing at bottom of page of original certified Transcript of Record.**

The Court: I wish to thank counsel for his extra trouble in that connection and to commend him for it, and I hope that you will at every opportunity let the government agencies in Washington who are assisting you in providing documents know of the desirability of this and the Court's wishes about it.

Mr. Evans: We do that every time we have an opportunity, Your Honor.

Mr. Seering: It is agreed that this may be received.

The Court: That will be marked Plaintiff's Exhibit 1. It is now admitted.

(The document referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.) [5]

Mr. Seering: I will call Mr. L. H. Doolittle.

L. H. DOOLITTLE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Seering:

Q. Will you state your name, please?

A. L. H. Doolittle.

Q. And where do you reside?

A. Seattle, Washington.

Q. And what is your occupation?

A. I am in the transportation business.

Q. Presently where are you engaged in furthering your occupation?

(Testimony of L. H. Doolittle.)

A. Alaska and in Washington.

The Court: Washington City or Washington State?

The Witness: Washington State.

Q. Were you engaged in the transportation trucking business in 1945? A. Yes, I was.

Q. Were you connected with the Foster Transfer Company? A. Yes.

Q. I will ask you whether the Foster Transfer Company is a corporation? [6]

A. Yes, it is.

Q. And has it paid all of its license fees due the State of Washington? A. Yes, it has.

Q. Its principal place of business is in Seattle?

A. That's right.

Q. Were you an officer of that corporation?

A. Yes.

Q. What was your office? A. President.

Q. Now, did the Foster Transfer Company enter into a contract with the United States Government in 1945? A. Yes, it did.

Q. Do you recall the date of that contract?

A. It was in June—about June 26th or 28th, 1945. Effective July 1st.

Q. Well, the contract is in evidence and speaks for it. The services called for by that contract were of what type?

A. Well, they were of average quality.

Q. No; I mean what were the nature of the services? What were you supposed to do?

(Testimony of L. H. Doolittle.)

A. Well, under the contract it called for drayage of general merchandise, moving of office equipment, packing and crating of household goods, picking up of household [7] goods, and packing the household goods, and also furnishing labor at the Government's call.

Q. And for whom——

The Court: Speak clearly and distinctly.

Q. For whom were these services to be performed? A. For the government agencies.

Q. Can you tell us how many government agencies there were that were procuring services under this contract?

A. No, I can not, because every day we would have another one, or one that we hadn't had before.

Q. Can you give us some approximation of your principal ones?

A. Well, of the total that we did business with, there were 39—over the period of time that we had the contract, but we never did work for all of those every day.

Q. Who were the largest users of your services under the contract?

A. The largest user was the Port of Embarkation and the Fort Lawton Rail Transportation Office.

Q. And did you furnish a bond as required by the contract? A. Yes, we did.

Q. And the amount of that bond was what?

A. $10,000.

Q. And did you undertake performance under the contract? [8] A. Yes.

Q. How long did you perform under the contract?

A. Approximately seven months.

The Court: May I interrupt you a moment? For my convenience, state the name of that Fort Lawton concern. Fort Lawton what?

The Witness: Fort Lawton Rail Transportation Office. It is a Division of the army.

The Court: You may continue.

Q. (By Mr. Seering): I will ask you this: Was your contract canceled? A. Yes, it was.

Q. When did that occur?

A. It occurred on the 26th of February, I believe, 1946.

Q. And in what manner was that cancelation made? A. By registered letter.

Mr. Seering: I ask to have this marked.

(Letter marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Seering): Referring to Plaintiff's Exhibit 2 for identification which has now been handed to you, will you tell us what that is?

A. That was a letter which was received canceling the contract.

Mr. Evans: I am willing to stipulate that it is a government letter terminating the contract.

Mr. Seering: It is offered for that purpose.

The Court: It is admitted. And will the witness spell the name of the man who signed that letter?

(Testimony of L. H. Doolittle.)

The Witness: I-h-l-a-n-f-e-l-d-t.

The Court: I don't get that.

The Witness: I-h-l-a-n-f-e-l-d-t.

The Court: What are the initials?

The Witness: William B.

(Letter marked Plaintiff's Exhibit No. 2 for identification received in evidence.)

The Court: You may continue.

Q. (By Mr. Seering): Now, as I understand it, there were no reasons stated in the notice of cancelation? A. That is right.

Q. For the cancelation? A. That is right.

Q. Had you had any conversations immediately preceding that notice? A. No, we had not.

Q. Relating to grounds for cancelation?

A. No.

Q. Had you been given any notice of any kind that would lead you to believe that your services were in question—the quality of your services were in question? [10] A. No, we had not.

Q. Now, what can you tell us as to the quality of the services which were rendered by the Foster Transfer Company during the seven months during which it performed under the contract?

A. Well, for that period of time I would say the services rendered were very good.

Q. Were there complaints during that period of time?

A. Yes; we received complaints from the Treasury Department.

(Testimony of L. H. Doolittle.)

Q. What were the nature of those?

A. Oh, that—one complaint—the main complaint that we had was that we sent open equipment where they said we should have sent closed equipment.

Q. What were the facts in regard to that?

A. Well, at the time I couldn't say that we should have sent closed equipment and I can't say that we should have now because I didn't know then and I don't know now.

Q. Without going into detail of numerous instances, what would you say as to the quality of your performance as compared to the general performance of trucking companies under similar contracts?

A. Well, from what we found out, why, we did a pretty good job. From the investigation we made at the time, the [11] people we talked to, the government agencies we were doing work for seemed to think we were doing pretty good.

Mr. Evans: Well, I am going to object to the answer as given here. I did not realize at the time the question was asked that it was going to be of a hearsay nature, that is, that the answer would be, and I am going to ask that the answer be stricken unless he can state upon what basis he makes this statement.

The Court: Probably the Court should sustain the objection upon a ground not stated. It seems to me that the real reason it is objectionable, the

(Testimony of L. H. Doolittle.)

witness is stating his own conclusion about something that may involve facts not sufficient to support the conclusion.

I think what he should say is what he was told and whether the person acting for the Government had authority to act for the Government. There is no reason why he cannot say what was said regarding the quality of his services, if the person saying it was authorized to deal in that capacity for the Government.

The objection is sustained.

Q. (By Mr. Seering): I will ask you if, after the cancellation of your contract, you consulted with the representatives of a number of the government agencies as to the [12] quality of your services? You can answer that yes or no.

A. Yes, we did.

Q. Now, were those people who were authorized to represent their particular agencies in matters of transportation with regard to the use of the services of your company? A. Yes, they were.

Q. And what was the information you obtained from those people?

Mr. Evans: I am going to object to this. If it is desired to have the reports of what those people say, I believe they should be subpoenaed so that they can be cross-examined. I do not believe it is competent testimony for this witness to testify as to what somebody told him.

The Court: You will have to state who it was

(Testimony of L. H. Doolittle.)

and what their relationship to the subject matter was. He will have to state who it was and what their relationship to the subject matter under discussion was.

Q. (By Mr. Seering): Can you tell us who these people were that you talked to?

A. Well, we talked to a captain down at the Port.

The Court: Captain who?

The Witness: Galt.

Q. (By Mr. Seering): And what was his job?

A. He was in charge of packing and crating household goods for the Port. And Captain——

Q. Wait a minute. What did he say?

Mr. Evans: I am going to object to what he said as being hearsay. It is strictly hearsay for this witness to testify as to what somebody else told him.

The Court: Ascertain from this witness, if he knows, whether this captain had anything to do with the operations of the contract.

Mr. Seering: Well, I thought we had covered that. I will ask the question.

Q. (By Mr. Seering): Was Captain Galt, in the performance of his duties, familiar with your performance under this contract in question?

A. Yes, he was; very definitely.

The Court: You might ask him how he became familiar.

Q. (By Mr. Seering): Will you tell us the extent of his connection with your work?

A. Well, Captain Galt had direct charge of all

(Testimony of L. H. Doolittle.)

of the household goods which the Seattle Port of Embarkation handled for army personnel. It was he who gave us orders to go out and pick up all of these household goods and what to do with them after we picked them up. He was the man who told us where to ship the household [14] goods to when they were packed and crated; so he had direct supervision over the operation of all of the household goods.

Q. What did Captain Galt state as to the quality and nature of your services?

Mr. Evans: I am going to object again on the ground that whatever Captain Galt said is hearsay and should not be considered by this Court.

The Court: It is overruled. He may answer now.

A. Captain Galt told me after this contract was canceled that we had done a good job for the Port and that he would talk to Captain Hogan of the Port procurement office and see if the Port——

The Court: I understood it was something he said before the cancellation. I am not so convinced of the admissibility of this evidence over objection. I thought you were going to inquire as to what took place before the cancellation in the ordinary course of business that was done.

Mr. Seering: Your Honor, I do not see the distinction. Here are agents of the government with whom we are dealing who have stated, whether it

(Testimony of L. H. Doolittle.)
is before or after, that the quality of the services rendered under the contract were satisfactory.

The Court: Well, it is the same thing as if the government were trying to prove something that you said after the lawsuit commenced. I believe that the objection should be sustained.

If you wish to inquire into what Captain Galt said before the contract was terminated or canceled, the ruling will be different. But as to what was said after the dispute arose, I think the objection will be sustained.

Mr. Seering: Exception.

The Court: Allowed.

Q. (By Mr. Seering): Did you have any conversations with Captain Galt during the life of your contract and before cancelation?

A. Many conversations—every day.

Q. Well, having in mind the questions asked you preliminarily, will you tell us what those conversations were, and relating particularly to the nature and the quality of your services under the contract?

A. Well, he thought we were doing a good job: If he hadn't, he would have given it to somebody else, because it was at his discretion to do so.

Q. Now, were there any other representatives of agencies of the government with whom you talked—and having in mind the ruling of the Court that your conversation must relate to a time during the life of the contract [16] and before its cancelation.

Mr. Evans: May I interrupt? It may be under-

(Testimony of L. H. Doolittle.)
stood that my objection goes to all that Captain Galt said?

The Court: No. The Court wants to know who it was and what their relationship to the work was.

Mr. Evans: Just for the purpose of the record, Your Honor, I would like—my objection goes to all that Captain Galt said.

The Court: The reason I do not approve of that, I have concern that there might be a situation where the witness would not say preliminarily what connection a man who made the statement had with the doing of the work and until that is brought out I do not know whether the objection applies. I would rather have the objection made each time.

Mr. Evans: Very well, Your Honor.

Q. (By Mr. Seering): Just answer that question yes or no. The question was: Were there any other representatives with whom you talked?

A. Yes.

Q. Name one.

A. John Conley, War Assets.

Q. And what was his position with the War Assets Administration? [17]

A. He had charge of moving all their material.

Q. And in the performance of his duties did he become familiar with your work?

A. Yes, he did.

Q. What was his relationship to your performance of your duties under your contract?

A. He was the man we did the work for. He called us.

(Testimony of L. H. Doolittle.)

Q. All right. Will you state what he told you with regard to the quality and nature of your services?

Mr. Evans: I am going to object to that question as being hearsay.

The Court: Overruled.

A. On one large move we made for the War Assets from the Wilson Business College building—the Textile Tower—he said we did a very, very, good job.

Q. Were there any other representatives of government agencies with whom you talked?

A. Well, I talked to lots of them, but I can't—Mel Mullet of the United States Army Engineers.

Q. What was his position?

A. He has charge of transportation.

The Court: It might be helpful if someone would spell that name for the record. I didn't clearly understand what the witness said.

The Witness: Melvin Mullet, M-u-l-l-e-t. [18]

The Court: What was he?

The Witness: He was with the U. S. Army Engineers.

The Court: You may continue.

Q. (By Mr. Seering): And state again what his position was.

A. He had charge of transportation for the Army Engineers.

Q. And in the performance of his duties would he be familiar with the quality of the services which you performed under your contract?

(Testimony of L. H. Doolittle.)

A. Yes, he would.

Q. And what was your conversation with him?

Mr. Evans: I am going to object to anything he might have said as being hearsay.

The Court: Overruled.

A. Well, directly I never had any conversation with Mr. Mullet over the quality of our work. We have continued to do work for Mr. Mullet since.

Q. The quality of your work never came into question? A. No, it never did.

Q. What can you say with regard to the volume of work which you had been performing for the Army Engineers?

A. Well, the Army Engineers, in dollars and cents, did the largest amount of hauling of any government agency.

Q. Do you recall any other representatives of government agencies with whom you discussed this matter during your contract? [19]

A. Well, I can't remember them, Mr. Seering, but you have a list there.

Q. Well, I was going to ask you, if you will refresh your recollection by referring to the document which I will ask the clerk to hand you——

The Clerk: Do you want it marked?

Mr. Seering: I do not want to introduce it as an exhibit, Your Honor. I simply want the witness to refresh his recollection from it.

(Document in question presented to the witness.)

(Testimony of L. H. Doolittle.)

Q. (By Mr. Seering): Now, having in mind, Mr. Doolittle, before you answer the question, that that document is dated at a time subsequent to the cancelation of the contract, and in line with the ruling of the Court, I want you to simply state whether during the life of the contract you had any conversations with any of the people named on that document who signed it.

A. I can't answer that question because I don't remember.

Q. Is that document dated?

A. Yes, it is.

Q. What is the date?

A. March 1st, 1946.

Mr. Seering: If Your Honor please, I have changed my mind with regard to offering it as an exhibit. [20] I had in mind the ruling of the Court and I think this, perhaps, comes within the Court's prohibition. However, for the record, I would like to have it identified and offer it as an exhibit.

> (Document entitled Appeal of Foster Transfer Company, Inc., Contractor under Contract T11rp-156 marked Plaintiff's Exhibit No. 3 for identification.)

Mr. Seering: I understand Counsel has no objection.

The Court: To Plaintiff's Exhibit 3?

Mr. Evans: I have no objection, Your Honor.

The Court: It will be admitted.

(Testimony of L. H. Doolittle.)

(The document heretofore marked Plaintiff's Exhibit No. 3 was received in evidence.)

Mr. Evans: I might state to the Court that that document is also a part of the file of the Secretary of the Treasury who reviewed this dispute—or this cancelation and confirmed the local office's action here, which will be offered later—well, at any time it is agreeable to counsel. But that will be in evidence later, anyhow.

Mr. Seering: I have no further questions of the witness on that. [21]

Q. (By Mr. Seering): I will ask you: Referring to the exhibit with the signatures attached to the notice of appeal, what is that?

A. This is a list of the people for whom we did work and who Mr. Hallam contacted. And he asked them if our services had been all right, and they said yes.

Q. Who is Mr. Hallam?

A. Mr. Hallam was the manager who had charge of the work for me under this contract.

Q. You, yourself, did not contact those individuals whose signatures appear there, then?

A. No, I did not.

Mr. Seering: That is all.

I understand the exhibit is received without objection.

The Court: It is admitted.

Q. (By Mr. Seering): Now, you have alleged in your complaint that your loss by reason of the

(Testimony of L. H. Doolittle.)
cancelation of the contract for the unexpired five months term was $5,000. How do you arrive at that figure?

A. Well, profit on this contract ran approximately a thousand dollars a month previous to this time. It had run over—a little bit over a thousand dollars a month, and if work fell off, or something, it probably would go down to about a thousand dollars a month. [22] That is the reason we figured a thousand dollars a month.

Q. Did you at my request yesterday go through your records to determine the gross volume of work done under this contract? A. Yes, I did.

Q. And can you tell us what that figure was, or do you wish to refer to the figures which you took from your record?

A. In order to be correct, I would have to refer to the figures.

Q. I will hand you those to refresh your recollection.

The Court: While you are doing that, I wish the reporter would read the last three questions and answers after the Court's ruling on Exhibit 3.

(The questions and answers referred to were repeated by the reporter.)

The Court: You may continue.

Q. (By Mr. Seering): I have handed you an adding machine tape for the purpose of refreshing your recollection. Will you now tell me what your

(Testimony of L. H. Doolittle.)

gross volume was under this contract for the seven months' period that was in effect?

A. $52,179.02. [23]

Mr. Evans: Will you read that again, please?

The Witness: $52,179.02.

Q. (By Mr. Seering): And can you tell us what your gross profit on this particular trucking operation was?

A. The gross profit on this particular operation was $13,421.

Q. Well, how do you arrive at that figure?

A. That was after our payroll and everything was deducted on this operation. All expenses were deducted. In other words, a little better than 20 percent.

Mr. Seering: You may examine.

Cross-Examination

By Mr. Evans:

Q. Now, were those figures which you just read taken from your books? A. Yes.

Mr. Seering: Excuse me, Counsel. I have a further question.

Direct Examination—(Continued)

By Mr. Seering:

Q. You have denied paragraph 6 of the Complaint. I have not asked any questions on that. You allege in paragraph 6 that the plaintiff is the sole owner of the claim herein sued upon, and that no assignment of such claim or any interest therein has been made to any [24] person and that no other

(Testimony of L. H. Doolittle.)

action has been had on said claim in Congress or by any of the defendants. A. Yes, sir.

Q. And is that true? A. Yes.

Mr. Seering: You may examine.

Cross-Examination

By Mr. Evans:

Q. Now, these figures that you just read, you took those from your books and records?

A. Yes, we did.

Q. Are those books and records available here in Court? A. Yes, they are.

Q. Do you have them all here? A. Yes.

Q. Can you tell us how much of that $52,000 was made during the calendar year of 1945?

A. I could. I can't from this, but I could from the books.

Q. How long would it take you to do that?

A. Probably about an hour.

Q. Now, as I understand, the Foster Transfer Company had been in business for some time; is that correct? A. That is right.

Q. How long had the Foster Transfer Company been in business? [25] A. Since 1934.

Q. And it did other business besides its contract, I presume? A. That is right.

Q. Now, what kind of a six months did you have prior to July 1st, 1945, that is, from January 1st to July 1st, 1945? Were you doing any business during that period? A. Yes, we were.

(Testimony of L. H. Doolittle.)

Q. That is, the Foster Transfer Company was doing some business? A. Yes?

Q. How much business do you estimate you did in the six months prior to the contract. Have you any idea?

A. I couldn't tell you that at all. I haven't any idea.

Q. Now, this contract you entered into with the government about which this lawsuit is about, you set out in there the rates, the set rates that you would charge for your services, is that correct?

A. That is right.

Q. And prior to submitting your bid you determined how much those rates would be, is that correct? A. Yes.

Q. Now, can you tell me whether or not the rates which you set out in that contract, your bid, which was ultimately [26] accepted, how those rates compare with the charges which you might charge other people? A. On our State tariff.

Q. Well, if I wanted to have some hauling done independent of any governmental agency, how would the rates compare that you were charging the government as with anybody else? Were they about equal, greater, or less?

A. Well, they were, on the whole, less.

Q. They were less? A. Yes.

Q. In other words, you were charging the government less than you were charging other people?

A. Yes.

(Testimony of L. H. Doolittle.)

Q. Now, how many employees did you have working for you on July 1st, 1945; do you recall that?

A. Foster Transfer at that time had five.

Q. Five employees? A. Five employees.

Q. The Foster Transfer Company?

A. Yes.

Q. That was on July 1st, 1945, previous to the time of this contract? A. Yes.

Q. Now, was Mr. Hallam, Mr. Sydney Hallam working for you at that time? [27]

A. Yes, he was.

Q. And in what capacity was he working?

A. Well, as an outside man.

Q. Now, what do you mean by outside man? I wish you would just state generally what his duties were—what was expected of him.

A. Well, he could contact people and see that the trucks got to their place on time and see that everything went along smoothly. Anything that he could do to help the thing along, why he would.

Q. Well, now, isn't it a fact that you hired Mr. Hallam at about this time specifically to handle the work of the Foster Transfer Company under this government contract?

A. No, that is not right.

Q. Isn't it a fact that Mr. Hallam was working for the Treasury Department until a very short time prior to the time you got this contract?

A. That is right.

(Testimony of L. H. Doolittle.)

Q. And isn't it a fact that you considered that he was competent and experienced in the type of government paper work which would come under this contract? A. That is right.

Q. And isn't it a fact that that is what you told him—at least was one of the reasons you were hiring him for this job? [28]

A. Well, he wasn't hired specifically for any one job. He was hired to do the work, yes; but anything else that came along, why, he was also to do that, too, if he could.

Q. Now, were any of Mr. Hallam's duties in the nature of supervising the movement of whatever it was that needed to be moved under this contract?

A. Yes; that is right.

Q. And will you state whether or not he was more or less in charge of the dispatching of the trucks?

A. He was in direct charge of dispatching the trucks—all trucks.

Q. I will ask you whether or not it was his job to supervise all of the movements under this contract? A. No, it was not.

Q. How much of it?

A. All that he could handle.

Q. And who was to supervise the rest of it?

A. I had two or three other men.

Q. How many other men?

A. I had three that did direct supervision besides myself.

Q. Three other men. That makes Mr. Hallam

(Testimony of L. H. Doolittle.)
and three other men—that is four. And I presume you were the fifth employee, is that correct?

A. That is right. [29]

Q. In other words, the Foster Transfer Company just had the five of you; you and Mr. Hallam and three other men whom you considered supervisors?

A. That is right.

Q. At the time you entered into this contract?

A. No, no; you are not right there, Mr. Evans. You see, there are other companies involved in this operation, too, besides just Foster Transfer.

Q. How is that?

A. There are other companies involved in this besides the Foster Transfer Company.

Q. Are you stating now that the government entered into some other contract with some other organization?

A. No! No; but I also own Doolittle Trucking in which I had a lot of employees.

Q. Now, wait a minute. Was the government doing business with the Doolittle Trucking Company or doing business with Foster Transfer Company?

A. Foster Transfer Company. But you are trying to find out the number of employees that Foster Transfer had.

Q. That is all I want, just those actually on the payroll of Foster Transfer. We are not interested in any other trucking company.

A. There were five.

Q. Five? [30] A. Yes.

(Testimony of L. H. Doolittle.)

Q. Now, at the time you entered into this contract, isn't it a fact that Mr. Street here, and Mr. Clark, came down to see you at your place of business before your bid was accepted?

A. I remember Mr. Clark. I can't say I—whether Mr. Street was there or not.

Q. Isn't it a fact they came down and talked to you about how much equipment you had and whether or not you would be able to do the job?

A. That is right.

Q. And isn't it a fact that at that time you submitted to them a typewritten list of your employees?—and your equipment?

A. That is right.

Q. Now, how many pieces of equipment did the Foster Transfer Company own at that time?

A. Two.

Q. Two? A. Two pieces directly.

Q. What two pieces?

A. A GMC truck and a Ford truck.

Q. A GMC 1939 van ton-and-a-half?

A. It could have been, yes.

Q. Was it a van or was it a flat bed truck? [31]

A. Van.

Q. Van. Now, what was the other piece?

A. It was also a van.

Q. Another van? A. Yes.

Q. What make? A. Ford.

Q. That was a Ford? A. That was a Ford.

Q. Do you recall the weight that it would carry?

(Testimony of L. H. Doolittle.)

—the weight it was listed as being supposed to carry?

A. Oh, about—you mean net carrying load?

The Court: You mean the same thing as you would describe the other van, as being a one-and-one-half ton?

The Witness: Well, that would be a one-and-one half, also, if you rate it that way. We don't rate them that way.

The Court: How do you rate it?

The Witness: As to the load they carry.

The Court: Then in that term or denomination describe the capacity of these two trucks.

The Witness: It would be 6 ton.

Q. (By Mr. Evans): You could load six tons of freight on them? A. Yes. [32]

Q. Now, I will ask you whether or not you are not required to submit a sworn statement to the Department of Transportation, State of Washington, for each year? A. We are.

Q. Do you have a copy of the one which you submitted for 1945 here with you as a part of your records? A. I don't believe we do.

The Court: We will take about a 10 minute recess at this time.

(Whereupon, a short recess was taken.)

(All parties present as before.)

The Court: You may proceed. Resume the stand.

Q. (By Mr. Evans): Now, Mr. Doolittle, I believe at the time the recess was called I was asking

(Testimony of L. H. Doolittle.)

you whether or not you were required to submit an annual report to the Department of Transportation, State of Washington, each year for the Foster Transfer Company. A. That is right; we are.

Q. And as I understand, you do not have your retained copy here? A. No, I don't.

Mr. Evans: I would like to have these two marked for identification separately, please. [33]

(Annual Report of Foster Transfer Company to Department of Transportation of Washington for year ended December 31, 1946, marked Defendant's Exhibit A-1 for identification.)

(Annual Report of Foster Transfer Company to Department of Transportation of Washington for year ended December 31, 1945, marked Defendant's Exhibit A-2 for identification.)

Mr. Evans: Your Honor, both of these exhibits are records of the State of Washington. They are certified copies attested to by the proper officer as authenticated by the Secretary of State and under the statutes pertaining to admission of evidence they are subject to being admitted in this Court as such records, and at this time I would like to offer them.

Mr. Seering: He hasn't asked the witness to identify them.

Mr. Evans: No. I don't know whether this witness can identify them, but they are certified copies of records of the State of Washington, attested by the proper officer and authenticated—authentication

(Testimony of L. H. Doolittle.)

is attached to each one by the Secretary of State stating that the person who made the attestation, certifying that it is a certified copy, is a proper officer to make such attestation. I believe it is Section 1938, [34] Title 28 that covers the requirements for admissibility of state records in the Federal courts.

The Court: Counsel for the plaintiff made a statement. It seems to me that your response did not meet the situation. He is not objecting to lack of authenticity but to a showing of materiality, as I understand it.

Mr. Seering: That is correct.

Mr. Evans: Very well.

Q. (By Mr. Evans): Now, Mr. Doolittle, will you look at either one of those exhibits and tell me for what year the particular numbered exhibit is so that I can get it straight? A. 1946.

Q. And what is the number the clerk has put on it? A. A-1.

Q. A-1. Now, will you look at that and state whether or not you know what it is?

A. I know what the report is.

Q. And will you state what the report is?

A. This is an annual report of the Department of Transportation issued by the carriers—motor carriers, State of Washington.

Q. And I will ask you whether or not it is the report of the Foster Transfer Company? [35]

A. Yes, it is.

Q. And after looking at it, will you state whether

(Testimony of L. H. Doolittle.)

or not you can recognize that that is a certified copy of the report which was submitted by you?

A. I imagine it would be. They have the correct copy down in Olympia.

Q. I will ask you whether or not you submitted such a report for 1945?

A. I personally, probably, didn't, but my accountant did.

Q. I will ask you whether or not you did not sign the copy that was submitted?

A. No, I did not.

The Court: Look at the purported signature.

The Witness: That is right; it is signed by my dad.

The Court: He said it is signed by his dad. Did he have authority to sign it and make that report for the company?

The Witness: Yes, he could sign it.

The Court: Did you approve his so doing?

The Witness: Yes.

The Court: Proceed.

Mr. Evans: I will offer Defendant's Exhibit A-1.

Mr. Seering: No objection. [36]

The Court: Admitted.

(The document heretofore marked Defendant's Exhibit A-1 was received in evidence.)

Q. (By Mr. Evans): And will you look at what has been marked for identification as A-2; and I will ask you whether or not that is a report for 1945, of the same nature as Exhibit A-1? A. It is.

(Testimony of L. H. Doolittle.)

The Court: What year was A-1 the report of?

The Witness: 1946.

Q. (By Mr. Evans): I will ask you whether or not that is signed by a person authorized to represent the Foster Transfer Company?

A. Yes, it was.

Mr. Evans: We will offer Defendant's Exhibit A-2.

Mr. Seering: No objection.

The Court: Admitted.

(The report heretofore marked Defendant's Exhibit A-2 for identification was received in evidence.)

Q. (By Mr. Evans): Now, will you please refer to Defendant's Exhibit A-2? Now, according to that report what was the gross business done by the Foster Transfer [37] Company during the entire year of 1945?

A. According to this, the total operating revenue was $18,460.14—no! I beg your pardon; I beg your pardon—$28,598.19.

Q. Now that sum, twenty-eight thousand five hundred and some odd dollars, represents the revenue received by the Foster Transfer Company during the entire year of 1945? A. That is right.

Q. Not only the revenue received from the government under this contract but also all other revenue received, is that correct?

A. From this report, that is right.

(Testimony of L. H. Doolittle.)

Q. Now, what were your operating expenses during that year, according to that report?

A. The operating expenses were $29,041.38.

Q. Now, according to that report did you make any money or lose any money?

A. According to this report, I lost $443.19.

Q. That is, for the entire year?

A. That is right.

Q. For all your operations?

A. That is right.

The Court: Mr. Reporter, will you repeat the total expenses? [38]

(The reporter then repeated the total expenses.)

The Court: You may proceed.

Q. (By Mr. Evans): Now, according to that report which you made to the State officials, the Foster Transfer Company, how much equipment did you have during that year?

A. On this there was one truck.

Q. One truck. What year and model?

A. 1939. GMC van.

Q. And what is the rated capacity according to that report? A. One-and-one-half ton.

Q. And what is the value of that truck at the end of the year according to that report?

A. $552.73.

Q. Now, please refer to Defendant's Exhibit A-1. I believe that is the report for 1946; is that correct? A. That is right.

(Testimony of L. H. Doolittle.)

Q. Now, what was the revenue which was received by the Foster Transfer Company for the entire year of 1946 according to that report?

A. $19,016.82.

Q. Now, what were the expenses of the Foster Transfer Company during 1946, according to that report? A. $18,300.40. [39]

Q. Now, according to that report, did you make money or lose money that year?

A. Made money.

Q. How much? A. $716.42.

The Court: Pardon?

The Witness: $716.42.

Q. Now, your contract was canceled, as I understand, effective the last day of February, 1946, is that correct? A. That is right.

Q. So your contract at the time of the cancelation had actually been in existence since July 1st, 1945? A. That's right.

Q. Now, that would make eight months, wouldn't it?—let's see—it would be through the months of July, August, September, October, November, December, 1945; that's six months; and then it was in operation through the last day of February, 1946?

A. That is right.

Q. That is an additional two months; so your contract was actually in operation for eight months?

A. That's right.

Q. And under the contract there was four months remaining rather than five as you previously testi-

(Testimony of L. H. Doolittle.)

fied, isn't that correct? It would be through the months of March, [40] April, May and June that the contract had yet to run? A. That is right.

Q. So you were mistaken when you testified formerly about it being five months?

A. That's right.

Q. Now, during 1946, you had other business besides the business which you did with the government, didn't you? During those first two months, that is, you had revenues other than from the government? A. I should have.

Q. Now, as I understand, you stated that you charged the government less than you charged other people? A. That's right.

Q. Then how can you justify your statement that you were making about a thousand dollars a month off of the government when during 1945, during the whole year, you lost $443 and yet you were charging the government less than you charged other firms?

A. Well, that total revenue there, and that loss, is the money that was collected, and that money run over into '47. Checks are still dribbling in on it.

Q. You mean you still haven't been paid for all the work that is due you under this contract?

A. That is right.

Q. Well, by the end of 1946 how much was still outstanding [41] that was due you?

A. That I can't tell you, but I just looked there now and I see where we got quite a bit in '47.

(Testimony of L. H. Doolittle.)

Q. What do you mean by "you got quite a bit?"

A. Well, about $400.

Q. $400. What do you consider to be your percentage of profit in the business?

A. Our gross profit—our gross net profit——

Q. Well, what do you mean? Do you mean gross profit or net profit? A. Gross profit.

Q. Gross profit.

A. It should be 20 per cent.

Q. 20 percent. Now, what would be your net profit?

A. Our net profit runs in the neighborhood—I can't tell you that, but it should run between 10 and 12 percent.

Q. Well, how much did it run?

A. On this contract? It ran better than 12 percent.

Q. Well, now, I don't understand how you can say that the profit on this contract ran better than 12 percent when on other business it only runs about 10 to 12 percent, when you are charging the government less than you charge other people.

A. We have a larger volume. We kept the men busy all the time. On our other work you have times when you are [42] not busy and your overhead still goes on.

Q. Well, isn't it a fact that this government business was sporadic?

A. No; after the first month it was very good.

Q. Well, wasn't it sporadic, that is, you didn't

(Testimony of L. H. Doolittle.)

know how much from one day to the next you would be called upon to do, did you?

A. Not exactly. I can't answer that yes, Mr. Evans, because after the first month we had gone around enough government agencies and we got enough work to keep busy.

Q. Well, there was nothing said about how much work you were going to get, was there?

A. Well, we had—at times we were booked ahead on jobs as much as two and three weeks. I can't answer that yes.

Q. Well, does that mean you were delaying the operations of what these government agencies wanted for two and three weeks until you would get around to handle it?

A. No. People would call up and they would tell you that at a certain day they would want to move. They would want to move a desk or would have a carload of furniture coming from the east and they would tell you the day it would be here; so you could figure out that way. Actually we had enough household goods so we didn't have to—the Port would tell us, or the Rail Transportation Officer at Fort Lawton would tell us, maybe a [43] month ahead of time, when certain men were going to be discharged from the army and when they would want their household goods packed and crated; and we could schedule it so we could work—just keep our men working. So actually it was a good operation.

Q. Now, just what capacity does your father

(Testimony of L. H. Doolittle.)

have down at this plant? You mentioned that your father signed some of those reports. Is he an officer of this corporation? A. He was.

Q. In what capacity did he work.

A. He was secretary-treasurer.

Q. Well, now, was he one of these five employees that you speak of? A. Yes, he was.

Q. How old a man was your father at that time?

A. 47.

Q. So there was yourself, your father, Mr. Hallam and two other people, is that correct?

A. That is right.

Q. That was all the operating personnel you had with the Foster Transfer Company?

A. That is right—at that time.

Q. At the time you entered into this contract?

A. Yes.

Q. Now, how much experience had you had in just plain [44] hauling without any loading or unloading?

A. I have been in the transfer business since 1937.

Q. 1937.

The Court: At the time your father was 47 years of age, how old were you?

The Witness: Well, that would be five years ago. I am now 29. I would be 24.

The Court: You were 24 years old when your father was 47?

The Witness: That is right.

(Testimony of L. H. Doolittle.)

The Court: Were you the president of the Foster Transfer Company when you were 24 years old?

The Witness: That is right.

The Court: You may inquire.

Q. (By Mr. Evans): Well, now, you have had experience since when? A. 1937.

Q. You started in this business when you were what age? A. About 18.

Q. How old are you now? A. 30.

Q. Now, how much experience had you had in crating and packing? A. Quite a little.

Q. How much experience had you had in moving furniture? [45] A. Quite a bit—a lot.

Q. A lot of experience in moving furniture?

A. That is right.

Q. How much experience had you had in the loading and unloading of furniture? A. A lot.

Q. And how much experience had you had in the loading and unloading of technical equipment such as radios and equipment of that nature which was used by the governmental agencies?

A. Well, I hadn't had too much because there isn't too much of it moved, but I think I had as much experience as the average drayman in the City of Seattle.

Q. Isn't it a fact that most of your experience in trucking prior to the beginning of this contract was where you would send a truck and somebody would load it for you and you would take it to its destination and somebody would unload it—maybe with a crane or some other piece of equipment?

(Testimony of L. H. Doolittle.)

A. No! No. Very little of that is done.

Q. Well, now, I do not mean under the contract. I mean prior to the contract.

A. No. That wouldn't be very practical.

Q. Now, under the contract which you entered into, isn't it a fact that according to the terms of that contract [46] the Procurement Division of the Treasury Department was the only governmental agency which was bound to do business with you, that others may have if they so desired?

A. That is right.

Q. In other words, according to the terms of this contract, The Procurement Division was bound to do business with your company and the other agencies could avail themselves of your services under that contract if they so desired?

A. That is right.

The Court: Did the Procurement Division have any connection with the Port of Embarkation? What local agency or government activity was identified with the Procurement Division of the Treasury Department, if any such agency was so identified?

The Witness: I don't know, Your Honor, myself. Maybe Mr. Street knows.

Q. (By Mr. Evans): Now, I believe you stated that no reasons were ever given to you as to why your contract was canceled. Was that your testimony? A. That is right.

Q. Now, I will ask you whether or not——

(Testimony of L. H. Doolittle.)

Mr. Seering: Counsel, if I may interpose, my question which he answered was that at the time of the [47] letter, which is in evidence, no reasons were given.

Q. (By Mr. Evans): In the letter of February 20th, which is in evidence here, that had no reason stated in it as to why your contract was being canceled? A. I don't believe it did, sir.

Q. Now, isn't it a fact that very shortly thereafter you made inquiry as to the reasons why your contract had been canceled?—either you, yourself, or through somebody representing you?

A. I think my attorney did, if I am not mistaken.

Q. He wrote a letter inquiring into the reasons, isn't that correct? A. I believe so.

Q. And isn't it a fact that in answer to that letter you received a letter dated, I believe, about February 28th wherein a number of reasons were set out as to the reason for having to cancel your contract? Do you recall that?

A. No, I don't. The only letter I received on February 28, or thereabouts, was one of cancelation —that I remember.

Mr. Seering: The letter was addressed to our firm, Mr. Evans. I have the original here.

Mr. Evans: Do you care to introduce it?

Mr. Seering: Yes. You may, if you wish. [48]

(Letter in question presented to Mr. Evans.)

The Court: That will be marked Defendant's Exhibit A-3.

(Testimony of L. H. Doolittle.)

(Letter from Treasury Department, Procurement Division, Region 11, to Messrs. Maxwell & Seering, dated February 28, 1946, was marked Defendant's Exhibit A-3 for identification.)

Q. (By Mr. Evans): You have been handed what has been marked for identification as Defendant's Exhibit A-3. Will you look at it and state whether or not you can identify it?

The Court: May I make one suggestion as to that form of question? In many instances—possibly not this one—it would shorten the result desired by the question by asking him to state if he knows what that is. I just offer that for your consideration without making any requirement at all.

Mr. Evans: (Addressing the Reporter): Strike my question.

The Witness: Well, Your Honor, and Mr. Evans, I have never seen this letter before—to my knowledge, anyway.

Q. (By Mr. Evans): You have never seen that letter? A. I don't believe so. [49]

Mr. Seering: I will agree that it may go in, Counsel.

Mr. Evans: Very well, I will offer it on counsel's stipulation, then.

The Court: Very well, Defendant's Exhibit A-3 is now admitted.

(The letter heretofore marked Defendant's Exhibit No. A-3 for Identification was then received in evidence.)

(Testimony of L. H. Doolittle.)

The Court: You may read it now or later, according to your preferences or convenience. As a matter of fact, I am going to excuse those in this case as soon as you feel there is a convenient breaking point in the taking of testimony.

Mr. Evans: Well, I can break it at any time it is convenient to the Court.

The Court: Very well, at this time I will excuse those connected with this case until two o'clock.

(Thereupon, at 11:45 o'clock a.m., Tuesday, August 2, 1949, the proceedings in the above entitled and numbered cause was recessed to 2:00 o'clock p.m.) [50]

Seattle, Washington
August 2, 1949, 2:00 o'clock p.m.
(All parties present as before.)

The Court: You may proceed with the case on trial.

L. H. DOOLITTLE

the witness on the stand at the taking of the recess, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Evans:

Q. Now, Mr. Doolittle, I believe you testified that you had had considerable experience in packing and crating and in hauling of the type under this contract? A. That is correct.

(Testimony of L. H. Doolittle.)

Q. Now, to your knowledge, had Mr. Hallam had any experience in that line?

A. No, I can't say that he did. Mr. Hallam was hired primarily on this job that he was hired for to keep in contact with government agencies, to see that the work was performed by our men in a correct manner and to keep the government agencies notified and do it the way [51] they wanted it done. Mr. Hallum was not hired to perform any specific act. We could hire lots of men that could pack and crate — good men — from other sources. We had supervision. We had packing and crating men before this contract came up for the army, the Army Engineers. Our drivers — we had a number of drivers who were pretty good men.

Q. Well, now, as I understand, at the time you entered into this contract there were five employees for the Foster Transfer. How many of those men were drivers?

A. Perhaps one of them. I wouldn't say that any of them were.

Q. Now, after you started the execution of the contract, how many employees did you have?

A. Working on this contract at various times we had as many as 50 employees.

Q. How many? A. 50.

Q. 50. Were they regular employees or part time employees?

A. The majority of them were regular employees.

Q. Then your operation increased tenfold after you took over this contract?

(Testimony of L. H. Doolittle.)

A. Oh, no — the Foster Transfer business did. Yes; that is right.

Q. Now, you had 50 regular employees with the Foster Transfer [52] Company?

A. No, I didn't say that. I said the majority of them were regular employees.

Q. Well, about how many were regular employees?

A. On the average, about 35 to 40.

Q. Do you recall the approximate rate of pay that those men received?

A. Oh, I can't remember that far back.

Q. Well, was it a dollar an hour, fifty cents an hour——

A. No, the drivers were a dollar thirty-five, I believe, an hour; helpers were a dollar fifteen an hour—oh, I can't remember. It is too long ago.

Q. It was somewhere in the neighborhood of a dollar to a dollar thirty-five an hour?

A. Approximately that, yes.

Q. You never hired anybody for less than a dollar an hour for that type of work?

A. Whatever the union scale was. We paid union scale.

Q. Well, to your knowledge do you remember ever hiring anybody for less than a dollar an hour?

A. It would be closer to a dollar and a half.

The Court: Do you recall having paid out any extra dollars which by reason of their expenditure did not assist in maintaining an increase in earn-

(Testimony of L. H. Doolittle.)

ings or adding something to the earnings as an incident of this [53] cancellation? Did this cancellation leave you in a position, your company, where you were committed to certain expenses that you could not terminate as quickly as the effective date of this contract?

The Witness: Yes, sir.

The Court: Well, I would like to have your discussion of those items.

The Witness: Well, I had a number of leased trucks, trucks leased by the month over a period of time, which were working on this contract. I had four from one fellow, Ernest Rutgers; and I was paying him at that time $250 a month for each one of those trucks and I had to pay him for one month after the contract was cancelled.

The Court: At $250 per month?

The Witness: Yes, sir.

The Court: And you had to maintain that expense for at least a month afterward?

The Witness: For one month. And then I had a warehouse which we had leased to augment packing and crating, and I had to carry that on at the rate of $75 a month, and I believe we had to carry that for three months.

The Court: Three. Now, I would like to hear that again. Mr. Reporter, would you please repeat the last statement of the witness?

(The last statement by the witness was then repeated by the reporter.)

(Testimony of L. H. Doolittle.)

The Court: $75 for one warehouse?

The Witness: Yes.

The Court: Three months' expense?

The Witness: Yes, sir.

The Court: Would that be about $225?

The Witness: That is correct.

The Court: Were there any other items comparable to that?

The Witness: No; that would be about the only thing I can think of. The books might show something else.

The Court: Did you have any salaried employees whose employment was necessarily continued and the continuance of such employment couldn't be avoided after the cancellation—when you did not need their services after the effective date of the cancellation?

The Witness: Yes, we did.

The Court: What is the detail about it?

The Witness: Well, we had two girls in the office that do the billing and book work on this contract, and we had a Mr. Hallam there who we had to keep. [55]

The Court: Wait just a minute. How long did you have to keep those two girls after the cancellation?

The Witness: We kept them for a month. We kept all our help for a month.

The Court: Do you know what the expense of those two girls' salaries was?

(Testimony of L. H. Doolittle.)

The Witness: $250 a month, I believe, apiece.

The Court: That would be $450.

The Witness: Yes, sir.

The Court: Now, Mr. Hallam, how much did you have to pay him after the cancellation?

The Witness: $300 a month.

The Court: How many months did you have to keep him before you could discharge him——

The Witness: Well,——

The Court: ——after the cancellation?

The Witness: Well, now, I can't answer that directly, Your Honor, because we kept him on for several years after that.

The Court: Well, that would indicate that you needed his assistance.

The Witness: That is right.

The Court: Now, who else, if anybody, did you have to continue on the payroll after this cancellation but whose services you did not need and would not have [56] kept but for the fact that you had this contract before cancellation?

The Witness: Well, that is all I can think of.

The Court: Can you think of any other expenses, expense items, any other overhead which you were incurring while the contract was in force and which you did not need afterwards but which you were not able to discontinue for any substantial time after the cancellation? Let me know of any such items.

The Witness: I can't think of any at the present time.

(Testimony of L. H. Doolittle.)

The Court: You may inquire.

Q. (By Mr. Evans): Now, Mr. Doolittle——

Mr. Evans: First of all, if Your Honor please, I would like to read this exhibit to the Court.

The Court: You may do that.

Mr. Evans: This is a letter dated February 28, 1946, addressed to Messrs. Maxwell and Seering, Attorneys at Law, White-Henry-Stuart Building, Seattle 1, Washington, from the Treasury Department, Procurement Division, Region 11, 1524 Fifth Avenue, Seattle 1, Washington.

"Gentlemen: Your letter of February 25, 1946 is received. It is assumed that reference in your letter to a Treasury Department letter of February 12 is an [57] oversight, inasmuch as the only recent letter to the Foster Transfer Company from this office carried the date of February 20, 1946, cancelling Contract T11rp-156.

"We are unable to provide you with any appellate procedure in regard to this termination, inasmuch as the contract specifically provides, (Paragraph 21, Page 9): 'The Government reserves the right to cancel the Contract at any time for what may be deemed good and sufficient cause.' This provision supersedes the General Provision to which you have made informal reference, viz., Article 3, which reads as follows:

"3. Disputes. Except as otherwise specifically provided in this contract [underscoring supplied], all disputes concerning questions of fact arising

(Testimony of L. H. Doolittle.)

under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance.

"Since Paragraph 21, Page 9, specifically provides for cancellation, there can be no question of our authority for doing so.

"In any event, however, we are entirely willing to supply a statement of the principal reasons for this action, as follows:

"1. During the contract period of approximately seven months numerous oral and some written notices and protests were filed with Mr. Doolittle concerning the inadequacy and generally poor condition of his automotive equipment. Complaints from Federal Agencies are on file in this office on this point. Our letters of September 26 and August 28, 1945 bear on this subject. No material improvement of the situation resulted from these protests.

"2. In a number of instances, open flat-bed trucks were provided by the contractor despite the fact closed trucks (or vans) were specifically ordered for specific jobs in inclement weather, with the result that Government property was damaged. In one instance, a federal agency ordered a closed van to transfer special technical radio and laboratory

(Testimony of L. H. Doolittle.)

apparatus. After a delay of two days, the contractor appeared on the scene with a flat-bed truck in inclement weather. In another case, Government furniture was rain damaged when moved on a flat-bed truck in wet weather, without adequate quilting. In still another case, a flat-bed truck was sent (in the absence of an available van) to move the household goods of a Federal Employee. This employee reported that the furniture [59] got extremely wet before it reached the contractor's warehouse. These are examples only.

"3. Despite numerous oral promises, Mr. Doolittle has either been unable or unwilling to provide an adequate number of trucks to efficiently perform the job.

"4. Frequently, Mr. Doolittle supplied trucks larger than necessary, or conversely, smaller than required, involving additional costs to the Government.

"5. By actual, first-hand experience acquired by us during the recent transfer of Government property from our Wallingford Warehouse, to 1518 First Avenue South, Seattle, and on a basis of complaints by other federal agency users, Mr. Doolittle's supervision and management were inadequate to the point where his employees either refused to perform efficient work, or were without proper direction to enable them to do so. In one instance, one of his employees, evidently intoxicated, attacked a Govern-

(Testimony of L. H. Doolittle.)

ment employee in the presence of Mr. Doolittle. Mr. Doolittle failed to intervene, although we understand he subsequently discharged the man.

"Criticism of Mr. Doolittle and his lack of management was frequently expressed by his own employees to our representative, both on and off the job. This expressed lack of confidence in his leadership noticeably depreciated the efficiency of his people and thus [60] prolonged the jobs for which the Government paid additional amounts of money. Moreover, this condition caused delays in effecting the transfer of Government property, often at great inconvenience and expense to using federal agencies.

"I regret the necessity for canceling this contract, but I had no alternative than to do so to protect the Government's best interests.

"Very truly yours," signed Wm. B. Ihlanfeldt, Regional Director.

Q. (By Mr. Evans). Now, Mr. Doolittle, do you recall having a conference on or about August 28, 1945, with the officials of the Treasury Department, principally Mr. Ihlanfeldt, or perhaps Mr. Street or Mr. Clark?

A. I personally have never talked to Mr. Ihlanfeldt in my life. I don't know the man when I see him, but I did have a conference with Mr. Street and with Mr. Clark.

I don't know if that is the one I went to talk on or not, because it was costing me a lot of money in the thing and I requested a conference with them.

(Testimony of L. H. Doolittle.)

We would have a pickup to go out on a job, or some government agency would want us, and we would get there and have to wait two hours, or they would still be in bed—the people wouldn't be out of bed yet and the dishes wouldn't be washed yet when we would try to [61] move their household goods, and it was costing us a lot of money. And we told them we would have to make a charge for it if there wasn't something done about it.

Do you remember that, Mr. Street?

Was that conference mentioned in that letter the 28th?

Q. Well, at the conclusion of that conference did you receive a letter from Mr. Street?

A. I talked to Mr. Street and Mr. Clark twice, and each time I received a letter from them.

Mr. Seering: Counsel, I have the originals of both of those letters, if you wish them.

Mr. Evans: Do you mind if they are introduced?

Mr. Seering: No.

Mr. Evans: Mark these for identification; that one first and then this one.

> (Letter from Treasury Department, Procurement Division, Region 11, to Foster Transfer Company, Inc., dated August 28, 1945, marked Defendant's Exhibit No. A-4.)
>
> (Letter from Treasury Department, Procurement Division, Region 11, to Foster Transfer Company, Inc., dated September 26, 1945, marked Defendant's Exhibit No. A-5 for identification.)

(Testimony of L. H. Doolittle.)

Q. (By Mr. Evans): Now, will you look at what has been marked for identification as Exhibit A-4 and state [62] whether or not you know what it is?

A. That is the one I was just talking about: that is correct.

Q. I will ask you whether or not that is the letter which you received from officials of the Procurement Division of the Treasury Department on or about August 28, 1945.

A. That is right.

Mr. Evans: We offer Plaintiff's Exhibit A-4.

Mr. Seering: No objection.

The Court: Admitted.

(The letter heretofore marked Defendant's Exhibit No. A-4 for identification was received in evidence.)

Q. (By Mr. Evans): Now, will you look at what has been marked for identification as Exhibit A-5, and I ask you whether or not you know what that is? A. Yes.

Q. I will ask you whether or not that is a letter which you received on or about September 26, 1945, from the Procurement Division, Treasury Department?

A. That is correct.

Mr. Evans: I offer Defendant's Exhibit A-5.

Mr. Seering: No objection.

The Court: Admitted. [63]

(Testimony of L. H. Doolittle.)

(The letter heretofore marked Defendant's Exhibit No. A-5 for identification was received in evidence.)

Q. (By Mr. Evans): Now, isn't it a fact that in your conference which you had on August 28, 1945, that your attention was called to the inefficiency of your company in performing work under this contract?

A. No, I don't believe you would call it inefficiency. Mr. Clark and Mr. Street—I went down and we talked the situation over. They brought up some points which we failed to do a good job on. Do you call that inefficiency when someone doesn't know about something until maybe a week or two after it happens and there is nothing you can do about it then? If they told you at the time, you might be able to do a good job.

Q. I ask you whether or not at the time of these conferences they told you about complaints which they had received on your services? Do you recall that from memory?

A. No, I don't remember. I don't remember any complaints at that time being talked of. We talked about the contract in general, and Mr. Clark seemed to be very interested in it. I wish he were here. He tried to help me as to—tell me what he thought should be done. In fact, we sat down and we worked out a program, a [64] tentative program that we could follow to a certain extent.

Q. What kind of a program?

(Testimony of L. H. Doolittle.)

A. Well, as to getting—assigning each one of the government jobs a number and keeping a complete record of each job which we did, the time the people ordered the trucks, and so on and so forth, so that there wouldn't be any complaint. We could go back for a month or so and tell what we had done. And we tried to comply with their wishes.

It is pretty hard in the trucking business or transfer business, where unexpected things arise, if somebody orders a truck for one o'clock, to have that truck at one o'clock if the truck is on a job at 11:00 o'clock, because they might not get through in time and you figure on trying to get that truck there at one o'clock and it doesn't arrive until 1:30. There is not much you can do about it.

The Court: For my convenience in this connection, will you repeat what you have already said as to what was the effective date of the cancellation of this contract?

The Witness: February 28.

The Court: February 28?

The Witness: Yes, sir; 1946. [65]

The Court: What was the date of the notice, if any, given to you of the intention to cancel on that date?

The Witness: February 20th, 1946.

The Court: You never had any notice before February 20th of intention by the government to cancel on the 28th of February?

The Witness: No, sir.

(Testimony of L. H. Doolittle.)

The Court: So the cancellation took effect eight days before—after the date of notice?

The Witness: That is correct. This letter was written on the 20th, so approximately eight days, Your Honor.

The Court: When did you receive that letter dated the 20th?

The Witness: Oh, probably the next day—the 21st.

The Court: You may resume your examination.

Q. (By Mr. Evans): Well, now, as I understand, the officials of the Treasury Department were endeavoring to assist you to overcome these complaints; is that right?

A. No, sir. There were no complaints. They were endeavoring to help me work out—Ken Clark was endeavoring to help me work out the thing so as to eliminate some [66] of the grief he had on the previous contract, because they had quite a few complaints on the contract and he didn't want to get in the same boat that they were before.

Q. Where did you get the information that they had any grief on the previous contract?

A. From their conversation.

Q. Will you refer to the last paragraph of the letter of August 28, 1945, wherein it states: "It is sincerely hoped that the standard of performance under this contract will be improved as a result of our discussion, and such corrective measures as you believe necessary will be applied. If complaints con-

(Testimony of L. H. Doolittle.)

tinue and are found to be justified, we should otherwise be forced to seek relief in accordance with the terms of the contract. We hope this will not be necessary."

The Court: What date—may I ask the witness what date, if he knows, was that?

The Witness: That was August 28th, Your Honor.

The Court: What year?

The Witness: 1945.

The Court: And what was the date of execution of the contract?

The Witness: July 3rd—July 1st, 1945.

Q. (By Mr. Evans): Well, then, on August 28, 1945, you were [67] aware that the Treasury Department would take action to cancel your contract if the performance by your company was not satisfactory, isn't that correct?

A. Mr. Evans, I was aware that the Treasury Department would take steps to cancel this contract if they could, perhaps, within a week after it was written.

The Court: What was the date of that letter from which you read?

Mr. Evans: August 28, 1945.

Q. (By Mr. Evans): Now, as I understand, you again had a conference with the officials of the Procurement Division on or about September 26th, is that correct? A. That is right.

Q. And at the conclusion of that conference you received the letter which is marked Exhibit A-5?

(Testimony of L. H. Doolittle.)

A. That is right.

Mr. Evans: I would like to read that letter to the Court, if I may at this time.

The Court: You may do so.

Mr. Evans: I would like to read from the original rather than this photostatic copy, if I may.

(The original of the letter in question was presented to Mr. Evans.)

Mr. Evans: Reading Exhibit A-5, a letter from the Procurement Division, Treasury Department, dated [68] September 26, 1945:

"Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 22, Washington

Attention: Mr. H. L. Doolittle

Gentlemen:

"Reference is made to our discussion this forenoon concerning your service contract No. T11rp-156, with specific reference to Item No. 2(A).

"I have reviewed the record and regret to tell you that I can see no way by which an amendment to the contract can be made, or any concessions legally granted to you. As I understand it, you are chiefly concerned about the small items of household goods aggregating less than 1,000 pounds. Your quoted price, 75c per hundred pounds, is identical to that extended by another bidder at the time award of the entire contract was made to your firm. There is no evidence, therefore, that any mechanical

(Testimony of L. H. Doolittle.)

error occurred in the statement of price when the bid was submitted.

"I understand, in a discussion you had with Mr. G. K. Clark, purchasing and contract officer in this office, it was your contention that your representatives have been required, in some cases, to await the convenience of the Government employee whose household goods were to be moved, thus resulting in a loss of time for [69] which no compensation can be granted. I am informed, however, that you have been asked to supply this office with details of future similar instances so that the cause can be removed. We shall be very glad to cooperate fully with you in this direction.

"The review of the record and discussion with Mr. Street brought to light certain criticisms of your services which already have been enumerated in his letter of August 28 to you. I only want to add a word of caution to you to comply fully with the intent and letter of the contract. The contract provisions contemplated clearly that you must be in position to supply all equipment and manpower and other services promptly and in an efficient manner and, aside from the fact that any deficiencies on your part jeopardize your present contract and your surety, any unsatisfactory experience with this particular contract will be an important factor in the award of any future contracts. A service contract of this nature will be a permanent arrangement hereafter, so full compliance with its terms, I am

(Testimony of L. H. Doolittle.)

sure you agree, will be an important concern to you in the long run.

"Very truly yours;"

/s/ "WM. B. IHLANFELDT,

Regional Director."

Q. (By Mr. Evans): I understand that you received that [70] letter September 27, 1945; is that correct? A. That is right.

Q. You read it? A. Yes.

Q. And you still want this Court to believe that you were unaware of any deficiencies or anything unsatisfactory on the part of your company?

A. I would like to have one specific instance which was ever set forth. I personally, or any of my men working for me, do not and did not know of one specific instance where we had any appreciable trouble or caused any delay of any kind. I mean specific. I can generalize, but personally I don't know of one specific instance where due to our negligence or due to my men's negligence we caused the government any amount of money, or lost time, that we personally in any way could have avoided, because we were sure watching that work. We watched that work more than we ever watched any other contract I ever had, and we had more——

Q. Well, now, the specific question I want to ask you: Do you still testify before this Court that you were not aware of the fact that the Treasury Department was not satisfied with your services?

A. Yes.

(Testimony of L. H. Doolittle.)

Q. In spite of the fact of these two letters received by [71] you? A. That is right.

Q. Now, were you on the job all the time?

A. Yes.

Q. Were you out supervising the work being done by your men?

A. I was in the office and outside, both.

Q. Now, do you recall the time when you went down with Mr. Hallam to the Alaska Communications System to talk about moving some heavy radios? A. Yes.

Q. Do you recall that the officer in charge wanted you to use a gate-lift truck?

A. A lift-gate? Yes.

Q. A lift-gate. Now, will you just describe to the Court here briefly; what is a lift-gate truck?

A. A lift-gate truck is a truck which has a platform attached to the rear of it which is raised and lowered—raised and lowered to the ground, and raised to the height of the truck by a hydraulic hoist.

Q. Now, I will ask you if it isn't a fact that the official you talked to at the Communications System stated that that was the type of equipment he wanted you to use in moving these heavy radios?

A. That is right. [72]

Q. I will ask you whether or not it isn't a fact that you deliberately told him you had such a truck when, in fact, you did not have such a truck?

A. I did tell him that, and I did have one.

(Testimony of L. H. Doolittle.)

Q. You didn't have one?

A. I did have one.

Q. You did have one? A. Yes, sir.

Q. You are certain of that?

A. Well, we used it all the time; I guess we had it.

Q. Well, is that this van that it speaks of in your statement?

A. No, sir. This truck belonged to W. C. Chesney Transfer Company.

Q. Now, isn't it a fact that within a day or so thereafter you were called upon to move some of these heavier radio units?

A. That is right.

Q. And that you did not send the type of truck that they wanted?

A. We did not. The lift-gate truck was not available at the time he wanted it, and I called the sergeant and talked to him. And he said, "Well, I think you can move it on a flat-bed." I went down with a flat-bed myself and moved it. That is all there was to it. [73]

Q. In spite of the fact that they originally ordered a gate-lift truck?

A. That is right. I told them they could wait and get it in the morning, and he said, well, they wanted to move it that afternoon.

Q. In other words, you did not have the equipment that they wanted at the time they wanted it?

A. That is right. If they call at 11:00 in the

(Testimony of L. H. Doolittle.)
morning and want you to have a truck at 1:00, it is sometimes pretty hard.

Q. Isn't it a fact, on numerous other occasions other than the 28th of August and the 26th of September, that you had oral conversations either by telephone or person to person with the officials of the Treasury Department in regard to complaints on your contract?

A. No, I wouldn't say so. I talked to Ken Clark several times. I went in down there to talk to him. We talked over things. Personally, I can't think of one concrete example of a complaint. We talked about performance, how we were getting along. Personally, I can't remember one concrete example of a complaint.

Q. Well, isn't it a fact that they told you that they had received complaints?

A. I wouldn't say so. I don't know.

Q. You don't recall that they told you that your performance [74] was not satisfactory?

A. No, I don't.

Q. But you wouldn't deny that they did tell you that, though?

A. I wouldn't deny it, but I pretty near would.

Q. Now, in December of 1945, isn't it a fact that you made some complaint to the Treasury Department, that they were asking for bids on a move of a warehouse for the Treasury Department?

A. I couldn't tell you the date, but I did make a complaint about it.

(Testimony of L. H. Doolittle.)

Mr. Seering: If Your Honor please, I do not think this is proper cross-examination. I did not go into it on direct.

Mr. Evans: Well, if it please the Court, what I am going into——

Mr. Seering: (Interposing.) I do not see what bearing it has on the question of the quality of performance under the contract. In other words, I am not trying to keep the evidence out, but I just don't think it is proper at this time. The fact which counsel referred to is that the Department called for bids on particular work and the Foster Transfer Company, through me, made a demand on the Department for the performance of that work under the existing contract, and as a result of that contention it eventually was awarded to us. [75] I do not think it is proper at this point. I am not going to urge it strenuously, however.

The Court: I will hear from opposing counsel.

Mr. Evans: Well, what I propose to go into are the circumstances which came up and the dissatisfaction with regard to this move.

The Court: The objection is overruled.

Q. (By Mr. Evans): Now, as I understand, you did undertake to move the Treasury Department warehouse from out here on Wallingford and another place down here on 8th Avenue to a place down on 1st South, is that right?

A. That is right.

(Testimony of L. H. Doolittle.)

Q. And do you recall approximately how long it took you to perform that move?

A. No, I don't.

Q. Would from the 18th of December to the 18th of January strike you as proper dates during which you performed that move?

A. I can't say.

Q. I will ask you whether or not that wasn't a rather large operation? A. Not too large.

Q. It wasn't too large an operation?

A. No.

Q. About how many men did you have employed on that job? [76]

A. Oh, it runs in my mind that there were about eight or 10 out at Wallingford and about 15 or 20 down at 1st South. It is just general figures. I can't remember.

Q. About how many down at 1st Avenue?

A. Mr. Street can tell you this better than I can. I don't know. Around 15. Whatever the government called for. The government told us how many men to have there and when they wanted them.

Q. Now, were these employees that you had at these places regular employees?

A. Some of them were.

Q. How many?

A. Oh, maybe half of them.

Q. Well, now, Mr. Doolittle, isn't it a fact that every day you would go down to the hiring hall and hire a new crew?

(Testimony of L. H. Doolittle.)

A. No. We would hire them when we needed them. We would go down the same as we do today.

Q. Isn't it a fact that there was only one man on that job continuously at Wallingford during the entire move?

A. That I can't tell you; I don't know.

Q. And isn't it a fact that complaints were made to you that the job was not going efficiently and it was not being handled properly and that you replied that you were unable to secure adequate help?

A. Oh, there could have been—we talked about different [77] things that we could do; about speeding the job along; different equipment we could get; and, sure, we talked about the job—the same as I talk about every job that I do. I went to the army; I went to the army personnel; the Port of Embarkation; I got lifts from the army to use in the warehouse out there.

Q. You got what? A. Platform lifts.

Q. You mean a fork-lift truck?

A. No, hydraulic lifts that run on a floor. You push them by hand. And in their warehouse out there they couldn't use anything. They didn't have any facilities to use anything.

Q. Who didn't have any facilities?

A. The Treasury.

Q. Well, now, wasn't your company the one who was supposed to make the move?

A. We didn't get paid for furnishing that

(Testimony of L. H. Doolittle.)

equipment. All we had to do was furnish the trucks and the labor. That is what our contract called for. That is what we did. I spent many hours on that job.

Q. In other words, do I understand that you don't consider it a part of your contract to move the warehouse merchandise out of the warehouse and onto your trucks?

A. Why sure, that is right. But I went and—in order to [78] speed the job up, in order to do a better job of it, on my own personal initiative, I went and got equipment.

Q. Who from? A. From the army.

Q. In other words, you went to another governmental agency to borrow equipment to perform your work?

A. Not my work; work for the Treasury—for which I didn't get paid.

Q. Well, now, weren't you paid for this move?

A. I was paid on man hours, for every hour a man worked and for every hour a truck worked. It didn't make any difference to me whether those men moved two ton of freight in an hour or a hundred ton.

The Court: I think counsel was asking you: What was your experience on this particular task? Is that what you are responding to?

The Witness: Yes, that is what I am telling, Your Honor.

A. (Continuing.) Well, I worked on that

(Testimony of L. H. Doolittle.)
Wallingford move myself many days. I tried to do a good job of it, and we did a very good job of it whether they think so or not.

Q. Isn't it a fact that many complaints were made to you?—that the job was taking entirely too long? A. We made an estimate on that job.

The Court: No. Try to answer it directly and then make any explanation you may wish. You go too far afield otherwise.

The Witness: A question like that, I can't answer it yes, because it would be wrong; and I can't answer it no, because it would be wrong.

The Court: What was your question again, Mr. Evans?

Q. (By Mr. Evans): Will you state whether or not complaints were made to you that it was taking too long to complete this move?

A. Four or five years is a long time; I can't remember. There probably were complaints, yes.

Q. As a practical matter, you were taking about twice as long as other bidders stated they could make the move in, isn't that a fact? Wasn't that made known to you?

A. I can't answer that because I don't know. But we made an estimate—can I go into that now?

The Court: Yes.

A. (Continuing.) We made an estimate in writing as to the length of time we thought it would take to do the job and I can't tell you how many days longer than the estimate we took, but

(Testimony of L. H. Doolittle.)
it runs in my mind that it was four or five days longer. And that was strictly an estimate.

Q. As a practical matter, it took you about 19 days to complete [80] the move, didn't it?

A. I can't tell you that. But whatever it was, it was four or five days longer than our estimate; and part of that delay, the four or five days, was on account of government elevators which were broke down, and we couldn't work, and on account of inclement weather in which the Treasury Department desired us not to work.

Q. Well, now, isn't it a fact that the Treasury Department, in order to expedite the move, had to put on one of their own trucks in order to assist in that move?

A. They didn't have to, but they did, because the truck was sitting idle and they might just as well use it. We had plenty of equipment.

Q. But if you had plenty of equipment, why couldn't you have made this move within your estimate?

A. It was not equipment which held us up; it was government elevators which were broke down.

Q. How long were they broken down?

A. Well, off and on—all the time. And on account of the rain——

The Court: I hope counsel can find some way to expedite the examination.

Mr. Evans: If there are some ex parte matters, I would be glad to break it at any time.

(Testimony of L. H. Doolittle.)

The Court: Are there any ex parte [81] matters or matters upon agreement to come before the Court?

You may proceed.

Q. (By Mr. Evans): Now, do you recall the time when a number of shelves were loaded on a truck—I believe at Wallingford—and taken down to the new warehouse on 1st Avenue and you had difficulty in unloading them?

A. Those shelves were purchased from the War Assets at the Renton—Boeing plant and they were loaded at the Renton-Boeing plant with fork-lifts in an upright position, and then the ones on top were laid down by fork-lifts. And when they got down to the new warehouse they had no means whatsoever to get these shelves off the truck except by labor. And they were piled on the truck six foot high and then one laid on top. And the shelves, as you people are probably acquainted with, are those collapsible shelves which are just set on top of a screw so you can pick them up and make them any height you want, and in order to get them off the truck they had to take hold of them by hand and lift them. And these shelves were all loose in there, and they come out and they collapsed, and we had a terrible time with them. In fact, one fellow went to the hospital over it. One of them fell on him.

Q. Well, now, isn't it a fact that at the time these shelves arrived that you wasted about an

(Testimony of L. H. Doolittle.)
hour or two discussing with your men how you might get those off of there? [82]

A. I probably spent longer than that because we had no way to get them off except to just take ahold of them and get them off. And that is what we finally did.

Q. Well, then, you admit that you were not experienced enough to know how to handle a job like that?

A. No. I had plenty of experience to handle it, but it was just one of those things. The way the War Assets of Renton loaded them, we couldn't get them off because they were laying flat and you go to pick up one of them and the shelves would come off, and that is all that holds them together.

Q. Isn't it a fact that you were not able to do anything about it until finally permission was given for you to dismantle them and take them off? A. That is correct.

Q. In other words, your company was charged with the responsibility of loading the equipment as well as unloading, wasn't it?

A. Well, War Assets at Renton loaded them. We did not load them.

Q. In other words, you chose to let them load them for you rather than load them yourself so you could handle them?

A. No. The Treasury Department made arrangements with the War Assets to pick up the shelves, and we were to have a truck out there at

(Testimony of L. H. Doolittle.)

a certain time to get the shelves. [83] We did. And they loaded the shelves and we brought them into town. And then the War—the Treasury Department wanted us to unload them, and we finally did.

Q. During the time when that truck was standing there while you were trying to figure out how to unload it, isn't it a fact that several other trucks were kept idle because they could not get in to unload?

A. There were several trucks there waiting, yes. In fact, I made the truck pull out and unloaded the other trucks first.

Q. I don't know whether I have asked you clearly this question yet, but can you state how many experienced people you had on this move?

A. All the truck drivers.

Q. The truck drivers were experienced. How were the men who were loading and unloading?

A. At Wallingford I happen to know of three men who are very good men, and at the south end, at 1st Avenue South, my dad was there all the time. I was there quite a bit of the time; not all the time. I couldn't devote all my time to it. We had some very good men down there.

Q. Well, now, who was at Wallingford?

A. Mr. Hallam, for one.

Q. And your father was at the 1st Avenue place? A. That is right. [84]

Q. Who was at the 8th Avenue warehouse?

(Testimony of L. H. Doolittle.)

A. We were not moving anything out of the 8th Avenue warehouse at that time. We moved that later.

Q. And you were at both places at times?

A. That is right.

Q. Now, who was supervising the other work which you were doing for the government?

A. I was.

The Court: Twenty minutes more is awarded—or allowed for further examination of this witness. Proceed.

Q. (By Mr. Evans): You caused an appeal to be made to the Secretary of the Treasury, if I am not mistaken, under the prvision of the contract to settle disputes on questions of fact.

A. Well, I believe so. My attorney could answer that better than I could.

Q. Well, you were president of the corporation, weren't you? A. Yes.

Q. And don't you know that an appeal was made to the Secretary of the Treasury?

A. Yes, there was.

Mr. Evans: I believe it would be appropriate at this time to have this marked for identification.

The Court: All right. [85]

(Photostat copies of papers in files of Bureau of Federal Supply re contract No. T11rp-156 with Foster Transfer Company, Inc., numbered 1 thru 76, certified by Treasury Department, marked Defendant's Exhibit No. A-6 for identification.)

(Testimony of L. H. Doolittle.)

Mr. Evans: I would like to offer at this time certified copies of the files of the Treasury Department, of their review of the Regional Director's action in canceling this contract. As I understand, Counsel has no objection; is that correct?

Mr. Seering: Yes, with the understanding that any documents herein contained are admitted as a part of the official file and not as proof of any independent facts stated in the documents.

Mr. Evans: Yes. They are only offered for that. I am not trying to prove any facts other than that.

The Court: Are both sides agreed as to what that is that the bailiff holds in his hand, namely, Defendant's Exhibit A-6? Is it a certified copy, certified by the head of the Treasury Department or by the proper certifying officer? Is it such a certified copy of the files and records of the Treasury Department, Procurement Division, in respect to this matter?

Mr. Evans: I claim it is, Your Honor.

Mr. Seering: Well, on counsel's statement, I agree. [86]

The Court: Defendant's Exhibit No. A-6 is now admitted.

(The document heretofore marked Defendant's Exhibit No. A-6 for identification was admitted in evidence.)

Q. (By Mr. Evans): I will ask you whether or not you have seen or received the action taken

(Testimony of L. H. Doolittle.)
by the Secretary of the Treasury in regards to that appeal?

A. I believe my attorney had a copy of it.

Q. Well, I will just ask you whether or not you know, of your own knowledge, that your appeal was denied. A. Yes.

Mr. Evans: I have no further examination of this witness at this time. I would like to reserve the right, perhaps, to call him later as an adverse witness.

The Court: That right is reserved.

Mr. Evans: I beg your pardon?

The Court: That right is reserved.

Do you wish to ask him anything on redirect?

Redirect Examination

By Mr. Seering:

Q. Mr. Doolittle, sometime shortly after you entered into this contract with the Treasury Department, Procurement Division, did you have any difficulty with Mr. Street [87] who is sitting here now at the counsel table?

A. No. Not personally, no.

Q. Well, to refresh your recollection, and calling your attention particularly to a question of demurrage on a shipment, was there any discussion of that nature?

A. Yes, there was. There was a carload of paper which came in here from the East, or from some destination. It sat on the team-track for many days—probably a week—and we were asked

(Testimony of L. H. Doolittle.)

—after it sat there for about a week, we were notified that it was out there and we went out that afternoon. We were called sometime in the afternoon. And we went out and we worked overtime, and Mr. Hallam, myself and two other men worked until quite late that night, and we unloaded the car to save any further demurrage. And then after it was all over, why, the Treasury Department thought that we should be liable for the demurrage because it sat out there so long. And we didn't know anything about it. We hadn't been notified or anything.

Q. You say the Treasury Department. Who, specifically?

A. Well, specifically it was through Mr. Clark and Mr. Street. They were the two men in charge.

Q. Had you any difficulties at all prior to that date—any question as to your service?

A. No, we hadn't—not to my knowledge. [88]

Q. Did you, after that time, with Mr. Street?

A. No; I never had any direct controversy with Mr. Street. In around about ways different things came up.

Q. Now, counsel has asked you about the Wallingford move in December of 1945. What were the facts in regard to that? Were you sent a copy of an Invitation to Bid and Acceptance which was issued by the Treasury Department on that move?

A. No, I was not.

Q. Where did you learn of it?

(Testimony of L. H. Doolittle.)

A. My man, Mr. Hallam, heard about it.

Q. Did you obtain a copy of that invitation?

A. With your help I did.

Q. And what did you do after getting that copy?

A. We made a protest to the Treasury Department, to the effect that we already had a contract covering that work so that there was no need to let another contract to do that same work.

Q. I was talking to the bailiff. What was your last answer?

A. I said we protested to the Treasury Department saying that we already had a contract covering that work and that we saw no need for them to let another contractor do it.

(Letter from Foster Transfer Co. to Treasury Department, dated December 15, 1945; letter from Harold A. Seering to Treasury Department, dated December 12, 1945; letter from Treasury Department to Foster Transfer Company, dated December [89] 14, 1945, with Invitation to Bid T11rp-46-104 attached, marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Seering): You are being handed Plaintiff's Exhibit 4 consisting of three separate documents. Will you tell us what that is, if you know?

A. The first one is a letter to the Treasury Department saying——

(Testimony of L. H. Doolittle.)

Q. Well, just to whom and from whom and pertaining to what without reading the contents.

A. Well, the Treasury Department, Procurement Division, 2028 8th Avenue, Seattle 1, Washington, attention of D. K. Clark, Chief Contract and Purchase Section, and it is from Foster Transfer Company.

Q. And pertaining to what subject matter?

A. It pertains to awarding of another contract to do this move from Wallingford.

Q. All right. Will you identify the others?

A. This was to the U. S. Treasury Department, Procurement Division, 2028 8th Avenue, Seattle 1, Washington, to Mr. Clark, and this again is in regard to this move on this contract, and it is from Maxwell and Seering, attorneys.

Q. And what is the third document?

A. And this is a letter from the Treasury Department to Foster Transfer Company, 13th and East Pine Streets, in [90] regard to the movement of government owned equipment and supplies from the warehouse at Wallingford.

Q. Signed by?

A. By G. K. Clark, Chief of Contract and Purchase Section.

Mr. Seering: I offer Exhibit 4.

Mr. Evans: No objection. Do I understand that they are altogether?

The Court: Admitted. The answer to your question is yes.

(Testimony of L. H. Doolittle.)

(The papers heretofore marked Plaintiff's Exhibit No. 4 for identification were received in evidence.)

Q. (By Mr. Seering): And after that exchange of correspondence the work was awarded to you under your existing contract?

A. That is right.

Q. Now, you testified that you furnished a bond, as required by the contract, in the amount of $10,000? A. I did.

Q. Were any claims ever filed against your bond? A. No.

Mr. Evans: I am going to object to this line of testimony. I don't believe it to be material at all, whether or not the government ever elected to proceed against the performance under the contract, and I am [91] objecting because I don't believe, for the purpose of the record, that it is competent evidence to be received.

The Court: Well, that objection is overruled.

Q. (By Mr. Seering): Had you answered the question?

A. Yes, we did furnish a bond in the sum of $10,000 and there was never any complaint or anything drawn against that bond.

Q. Now, counsel inquired of you in regard to your showing of gross returns for the Foster Transfer Company on this annual report to the Department of Transportation for the years 1945 and 1946. Were those returns prepared by you?

(Testimony of L. H. Doolittle.)

A. No, they were not.

Q. Did you, yourself, have any direct knowledge as to the returns other than having executed them?

A. No. It just happens that I didn't execute them, Mr. Seering; someone else did.

Q. You referred this morning to having taken the total gross volume of business under this contract from your records which are here. Do those records show in regard to this particular account the invoice numbers? A. Yes, they do.

Q. And can they be checked against the original invoices? A. They can.

Q. And is that total the correct total of the gross volume of business? [92]

A. That total which you and I added yesterday, that is on that tape, is the correct total.

Q. And that can be verified by these records here? A. That is right.

Q. Now, as to the number of employees and the amount of equipment owned by Foster Transfer Company, what is the situation as to the ownership of equipment used in the performance of this contract?

A. The equipment which was used on this contract was owned by me—Doolittle Trucking Company. I, in turn, leased the equipment to Foster Transfer Company for use on this contract or any other work that Foster Transfer had.

Q. As I understand it, you were operating also as Doolittle Trucking Company?

(Testimony of L. H. Doolittle.)

A. That is correct.

Q. And was that a corporation or as an——

A. An individual.

Q. Individual. And what is the reason for the separate operation?

A. Well, the reason was on account of the State Department of Transportation permits which are issued to cover a—specific types of operation which a permit can do.

Q. Are those permits transferable?

A. No, they are not.

Q. In the absence of authority from the State Department? [93] A. No.

Q. So that the permit, as I understand it, is limited as to its geographical area as well as the type of commodity which may be transported under it, is that correct? A. That is right.

The Court: I am sure both sides are taking too much time with this witness. I believe the ground can be covered much more quickly by both sides.

Mr. Seering: I am sorry, Your Honor. I am doing it as rapidly as I know how.

Q. (By Mr. Seering): Referring to the move for the War Assets—for the Treasury Department from the War Assets Administration at the Renton —Boeing plant, did you have any discussion with the government representatives before those shelves were loaded as to the manner of loading?

A. No.

Q. As I understood your testimony on that, your

(Testimony of L. H. Doolittle.)

job was simply to move them after they were loaded, is that correct? A. That is right.

Mr. Seering: That is all.

The Court: We will take a 10 minute recess.

(Whereupon, a 10 minute recess was taken.)

(All parties present as before.) [94]

The Court: You may proceed. The witness was on the stand. Unless counsel on both sides are finished, he will resume the stand.

Mr. Seering: He was excused, Your Honor.

The Court: Both sides excuse the witness who was on the stand? If there is anything further, the Court will wait and have him recalled to the witness chair now.

Will the witness resume the stand for further examination?

Q. (By Mr. Seering): Mr. Doolittle, I have just one further question. The incident which is mentioned in the letter of Mr. Ihlanfeldt, dated February 25th—or 28th, I believe, of one of your employees attacking a government employee in your presence, what are the facts with regard to that incident?

A. Well, I wasn't there to begin with. I got there about an hour after it happened. And the man had been drinking—several of them had. When the trucks would be finished loading, the boys, before another truck would come in, they would go across the street for a few minutes, I guess, for a drink. And what brought the controversy to a

(Testimony of L. H. Doolittle.)

head was, one of the government employees wanted the fellow to sweep the floor while he wasn't doing anything else, and he said no.

Q. What did you do with regard to disciplining the employee? [95] A. He was dismissed.

Q. Beg pardon? A. He was dismissed.

Mr. Seering: That is all.

The Court: Was that one of the persons who was referred to by you just now when you said the persons had been drinking? Was that the—was that person whom you dismissed included among those referred to by you as persons who had been drinking?

The Witness: Yes.

The Court: Proceed.

Recross-Examination

By Mr. Evans:

Q. Was this an employee who had been drinking? A. Yes.

Q. To your knowledge, had anybody else been drinking?

A. From what I could find out, there had been a couple of them drinking.

The Court: A couple of men?

The Witness: Yes.

The Court: Whose men? Your men or the government men?

The Witness: Of mine.

Q. (By Mr. Evans): In other words, you received no information to the effect that the government men had been [96] drinking, did you?

(Testimony of L. H. Doolittle.)

A. Did I? No. I didn't try to.

Q. Now, these men while on the job working for the government had been drinking, is that correct?

A. That was what I found to be correct.

Q. Now, as I understand your previous testimony, you took in a gross of $52,000—fifty-two thousand and some odd dollars gross business off this contract during the eight months it was in existence? A. That is right.

Q. And you claim that your profit was in excess of $13,000?

A. That is approximately what its was, yes.

Q. That was during the eight months?

A. Yes.

Q. Now, was there any difference in the amount of revenue you were taking in, any substantial difference, from month to month?

A. Well, I can't answer that.

Q. Well, what I am trying to get at, were the months of January and February substantially different from the months of November and December, let us say?

A. Again, I can't answer. The only month I know that would be greatly different from the other was the month of July.

Q. And that would be greatly different in what regard? A. Much smaller. [97]

Q. Much smaller. Well, would you say that the rest of the seven months was approximately equal as to the volume of business you were doing?

(Testimony of L. H. Doolittle.)

A. I would say so, yes.

Q. Now, as I understand you, you used the trucks of Doolittle Trucking Company and the Foster Trucking Company interchangeably?

A. Yes.

Q. In other words, you have certain permits for the Doolittle Trucking Company and you have other permits for the Foster Transfer Company and you just switch the trucks back and forth at your convenience? A. That is right.

Mr. Evans: I would like to have this marked for identification, please.

> (Report entitled Annual Report of common and contract motor carriers of property to the Department of Transportation for the year ended December 31, 1945, marked Defendant's Exhibit No. A-7, for identification.)

Q. (By Mr. Evans): I hand you what has been marked for identification as Defendant's Exhibit A-7. Will you take a look at it and see if you can determine what it is?

A. It is an annual report of L. H. Doolittle, an individual, for the year 1945. [98]

Q. Do you recall submitting the original of which that purports to be a copy to the authorities to which you are supposed to submit it to?

A. Well, it is a copy. I don't remember, but it was submitted.

Mr. Evans: I will offer Defendant's Exhibit

(Testimony of L. H. Doolittle.)

A-7. On the face of it—that is, on the back of it—it has the proper attestation by the officer who is the custodian of those records at Olympia together with the certification by the Secretary of the State that he is the proper officer to make such a certified copy.

Mr. Seering: No objection.

The Court: Admitted.

(The report heretofore marked Defendant's Exhibit No. A-7 for identification was received in evidence.)

Q. (By Mr. Evans): Now, will you look at that report, under what I believe is Schedule 4? Does it show a profit or loss for the year 1945? It is down at the bottom of the page. I believe it to be page 2. A. It shows a loss.

Q. How much? A. $7730.21.

Mr. Seering: That is objected to, Your Honor. I don't see what relation it has to the issues here, what [99] profit L. H. Doolittle, an individual, made.

Mr. Evans: Well, he has testified that the trucks are used interchangeably from one company to the other. I believe it is competent to show the profit or loss on behalf of the other company he operated.

The Court: The objection is sustained.

Q. (By Mr. Evans): Now, referring to the schedule of trucks owned by the Doolittle Trucking Company, is the list attached to that report a cor-

(Testimony of L. H. Doolittle.)
rect list of the trucks that the Doolittle Trucking Company had—owned?

A. Well, that's some of them.

Q. Beg your pardon?

A. That is some of them, yes.

Q. You had more? A. Definitely.

Q. But you did not list them on your report to the State?

A. They were probably listed. I can't tell you that, whether they were or not. But there are a lot more than that.

Q. And, as I understand your testimony, that report is incorrect—as to the number of trucks owned by the Doolittle Trucking Company?

A. This report is. This list is.

Q. That list is wrong? A. Yes.

Q. You have your duplicate copy, your retained copy of that [100] 1945 report? A. Do I?

Q. Yes. A. Not here, no.

Q. Do you have it in your files?

A. I imagine so—yes.

Q. Could you produce it here tomorrow?

A. Yes.

Q. Will you do that? A. Yes.

Mr. Evans: Thank you.

The Court: Step down—is there anything else that you want to ask?

Mr. Seering: No.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Seering: Mr. Hallam. [101]

S. W. HALLAM

called as witness by and on behalf of the plaintiff. having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Seering:

Q. Will you state your name, please?

A. S. W. Hallam.

The Court: S. B.?

The Witness: S. W. Hallam.

Q. Where do you reside?

A. 3854 37th Avenue South.

Q. And where are you employed?

A. National Transfer Company.

Q. Were you ever employed by Foster Transfer Company? A. Yes, sir.

Q. When did you start your employment there?

A. Sometime in July of 1945.

Q. Where had you worked prior to that?

A. I worked for the Army Engineers, Treasury and War Assets.

Q. What was the nature of your employment with the government?

A. With the Army Engineers I was dispatcher and in charge of all material equipment, material handling equipment. At the Treasury and War Assets I was just a messenger.

Q. And what was the nature of your employment

(Testimony of S. W. Hallam.)
and what were your duties with Foster Transfer Company? [102]

A. Mostly as supervisor of this Treasury contract.

Q. And just what did you do in connection with supervising the contract?

A. Well, I contacted all the people of the various agencies and talked to them about procuring under this contract. I did that usually—sometimes in the afternoon when I had a little time. In the mornings I dispatched the trucks and the men to the various jobs and kept the records of the jobs, as jobs and not as to the revenue.

Q. When you say you contacted the various government agencies with regard to procuring under this contract, were they advised by the Treasury Procurement Division that Foster Transfer had this contract, or was that the responsibility of the Foster Transfer Company?

A. I didn't know whose responsibility it was, sir, but I don't think they were advised.

Q. As far as you know, they were not advised?

A. That is right—that is, some of them. I know that some of them were, but there are quite a few that I know that weren't.

Q. Now, outside of contacting the agencies in trying to get them to use the services of your company, what else did you do?

A. I tried to give my personal attention to as many jobs as I possibly could. [103]

(Testimony of S. W. Hallam.)

Q. And can you tell us, what proportion of this work performed under this contract did you, yourself, oversee?

A. Just how do you mean that, Mr. Seering?

Q. How much of the overall work, what percentage would you say, if you can say, did you, yourself, supervise?

A. Well, I dispatched the trucks to all the jobs, and the men, but I didn't personally go out on the job with the men unless it was an extraordinary job. But I personally dispatched the men and the trucks to the various jobs.

Q. And is that customary in the truck transportation business—when a call comes in, is it customary simply to send the workmen out with a truck? A. Yes, sir.

Q. Ordinarily the supervisor doesn't go with it?

A. No.

Q. Now, were you familiar personally with the work performed by the Foster Transfer Company under the contract here in question.

A. You mean the Wallingford——

Q. No; I mean the overall contract, 156.

A. Yes, I was.

Q. What is the nature of your work now with the National Transfer? A. Salesman.

Q. And that is what kind of a company? What type of work do [104] they do?

A. General hauling.

Q. The same type as Foster Transfer Company?

(Testimony of S. W. Hallam.)

A. That is right.

Q. How long have you been with them?

A. Just a year.

Q. How does that operation compare in size to Foster Transfer Company?

A. They are considerably larger.

Q. Now, on the basis of your experience with this contract, and since terminating your employment with Foster Transfer Company, what can you tell us with regard to the quality of service which was rendered by Foster Transfer Company under its contract with the Treasury Department, Procurement Division?

A. Well, at that time everybody knows, I guess, that labor was very hard to get, especially competent labor, and I think that Foster Transfer did as well as could be expected with the help they could get.

Q. Now, did their services compare with the services rendered by other companies at that time?

A. At that time they were comparable.

Q. What would you say as to whether the Foster Transfer gave as good a service as it could reasonably give under that contract? [105]

A. Well, I would say there were certain circumstances where we probably could have given better service, but there were also circumstances where we extended ourselves far beyond where it was necessary in order to give good service.

Q. When you say there were certain circum-

(Testimony of S. W. Hallam.)

stances where you could have given better service, can you tell us specifically?

A. I don't know. It is pretty hard to tell specifically—just minor instances.

Q. In other words, is it a usual thing in the truck transportation industry that after the event many complaints arise? Is that correct?

A. Yes.

Q. And at the time had you known about them you could have corrected them?

A. That is right.

Q. Is that what you refer to?

A. Yes. Well, I don't know whether I can make myself clear. In the trucking industry you might have seven or eight jobs going on at one time during the day. Well, obviously you can't send a supervisor out on all seven or eight jobs because there just isn't enough revenue in the industry to warrant it.

Q. Now, where did Foster Transfer Company get its employees? [106]

A. From the Teamsters.

Q. And where does——

A. (Interposing): Sometimes we couldn't get them from the Teamsters and we got them from the Washington State Unemployment Board, I think it is called.

The Court: Keep your voice raised, clear and distinct so we can hear every word you say.

Proceed.

(Testimony of S. W. Hallam.)

Q. (By Mr. Seering): Where does every other trucking company get its employees?

A. The same place.

Q. Now, referring to an incident which has been referred to in the correspondence, particularly the letter of Mr. Ihlanfeldt, Regional Director of the Treasury Department Procurement Division, regarding the transporting of some technical radio equipment, were you familiar with that incident?

A. Yes, sir.

Q. Will you tell us the facts with regard to it?

A. We moved the equipment.

Q. Well, do you recall that there was a question as to a tailgate—lift-gate truck having been requested? A. Yes.

Q. Give us the complete facts as you know them with regard to that instance. [107]

A. I went down originally to talk to this man—I don't remember his name—and he asked me to bring Mr. Doolittle down the next day, which I did. And he asked Mr. Doolittle if we had a lift-gate truck. Although we didn't have one of our own, we did have one that was available for our use. It was owned by another company. And he told this man that, "Yes, we could get a lift-gate truck."

So the following morning he called up and wanted this lift-gate truck, but unfortunately it wasn't available.

Q. Do you know whether Mr. Doolittle, as he

(Testimony of S. W. Hallam.)

stated, talked to a sergeant who informed him that a flat-bed truck could be furnished?

A. That I don't know.

Q. You don't know that. Were you there on the move when the equipment was moved?

A. Yes, sir.

Q. Was it moved satisfactorily?

A. To my knowledge, yes.

Q. Was there any complaint on the manner in which it was handled?

A. No, sir; there was none made to me.

Q. Was there any damage caused?

A. No. In fact, we were commended on the job.

Q. On that particular move? [108]

A. Yes.

Q. By whom?

A. By the man in charge at the receiving end, for the way we put it down. He had it go down in a big bomb shelter and he said that was as nice a piece of maneuvering as he had ever seen.

Q. Are you familiar with the incident of some shelves which have been mentioned here?

A. No, sir; I am not.

Q. Are you familiar with the Wallingford move?

A. Yes, sir.

Q. What is the fact there as to the quality of the performance which the Foster Transfer Company gave under its contract in moving that equipment from the warehouse at Wallingford to its destination which was where? Do you recall?

(Testimony of S. W. Hallam.)

A. Somewhere on 1st Avenue South. I don't recall their correct address.

Q. Tell us particularly with regard to the nature and quality of performance on that job.

A. I originally—I think I talked to Mr. Sbinden originally on that job.

Q. Who was he?

A. Lloyd Sbinden? He was in charge—I think I am right—of that particular warehouse. And he informed me that the Treasury Department was figuring on putting the job [109] up for a bid. And I asked him why we couldn't do it. And he said he didn't know of any reason why we couldn't do it, but they were just figuring on putting it up for bid. And I turned that information over to Mr. Doolittle who in turn turned it over to his attorney.

The Court: You do not speak loud enough, Mr. Hallam. The last three words you used, it is very difficult for anybody to hear them. You must speak out. You do not speak loud enough. Keep your voice raised on every word so we can hear not only one word of a sentence but every word of a sentence.

The Witness: Yes, sir.

The Court: Proceed.

Q. (By Mr. Seering): Now, what was the total time consumed on that move?

A. I couldn't tell you. I don't remember.

Q. Do you have any approximation?

A. I think it was approximately two weeks.

Q. You recall that the government originally

(Testimony of S. W. Hallam.)

estimated that the job should require seven days?

A. No; I originally estimated that.

Q. What occurred to change that time of performance?

A. It was strictly an estimate in the first place. There were three days of very bad weather where Mr. Street and I by mutual agreement suspended all operations. And there [110] was two days that I know of that the elevator was broken down on 1st Avenue South. It might have been more, that I don't know of. I don't mean all day. There were two different days that the elevator was broke down.

Q. What about the facilities for handling the cargo at the warehouse?

A. The facilities for handling at the warehouse —well, they had sufficient boards there. This material was all stock piled in bins and the material had to be taken out of these bins and put on boards and taken to the receiving door where it was loaded on trucks. We had no trouble on that end whatsoever.

Q. Did you have enough equipment and men to handle the job? A. Yes, sir.

Q. In your contacts with the representatives of the Procurement Division, were any complaints made to you as to the quality of your work?

A. Yes, sir.

Q. What were those, if you recall, specifically?

A. Well, I don't know whether you would call

(Testimony of S. W. Hallam.)

them complaints or comments. I talked with Mr. Street at various times and he told me that certain things weren't going right. And I told him that I would do my best to iron them out, which I did.

Q. Do you recall specifically what those instances were? [111]

A. Well, one of them was this job with the Alaska Communications System. Another one, we had a colonel. We received his merchandise here in Seattle, and under our contract we had to unpack and uncrate this merchandise and put it in his home. We got out there and the colonel's wife had the drivers washing the dishes, hanging pictures upon the walls, laying the carpets, and everything else; and I knew that the government didn't intend to stand that expense, but there was nothing I could do about it.

Q. Well, how did a complaint arise out of that incident?

A. I stopped the men from doing that, and I think the colonel made a complaint through his office to Mr. Street. And we talked that over, and we got a ruling on that, that they wouldn't do that any more, that we were just to deliver the merchandise and unpack it and leave it there and not to hang the pictures and lay the carpets and wash the dishes.

Q. Are those the only instances in which you recall discussing the matter with Mr. Street?

A. I recall the instance of the shelves which was—I don't know this myself, because I wasn't

(Testimony of S. W. Hallam.)

there. Mr. Street was very unhappy with Mr. Doolittle about the method in which he unloaded the shelves.

Q. Now, you mentioned then three instances. The first was the Alaska Communications System, and that is the one [112] you said you were commended on? A. Yes, sir.

Q. And you can't recall any others?

A. No other complaints; no, sir.

Q. You are not personally familiar with the incident of the employee who allegedly attacked a government representative?

A. No, sir; I am not.

Q. You were subpoenaed by the government in this case? A. That is right.

Mr. Seering: You may examine.

Cross-Examination

By Mr. Evans:

Q. Mr. Hallam, during the course of this move to the Treasury Department's warehouse, isn't it a fact that Mr. Street complained quite frequently as to the length of time it was taking?

A. No, sir.

Q. Isn't it a fact that he complained quite frequently as to the inefficiency with which the job was being handled?

A. On the other end; not my end.

Q. Isn't it a fact that you were unable to secure adequate and competent help to handle that job?

A. At that time, yes. [113]

(Testimony of S. W. Hallam.)

Q. That is, the help you were receiving was not dependable, was it? A. That's right.

Q. Substantially, the help you were receiving were men from down here on skid-row who had no experience in that type of work, isn't that a fact?

A. Well, we didn't put those men on a job that really required any skill, as you might call it. We put them on just actual labor, that is, putting the stuff into boxes, or bringing the boxes over to the trucks. We didn't put those men on jobs requiring skill.

Q. You do not consider that that requires skill, the proper packing and——

A. There was no proper packing necessary because the stuff was just going down to this warehouse and was taken right out of the boxes again. In fact, there were two government men there supervising that particular end of it, that is, the packing.

Q. And isn't it a fact that most every day you would have a partially different crew on because the same help wouldn't show up the next day?

A. Two or three, yes.

Q. Now, as I understand, you have been offered a job with the Foster Transfer Company, or with the Doolittle Company, one or the other, is that correct? [114] A. Yes, sir.

Q. Have you decided whether or not you are going to take that job? A. No, sir.

Q. You are considering it? A. Yes, sir.

(Testimony of S. W. Hallam.)

Q. Now, isn't it a fact that at the time of the discussion with regards to this gate-lift truck with the Alaska Communications System that you called Mr. Doolittle's hand on that matter after you left there and told him that he shouldn't have told them that he had a gate-lift truck because he didn't?

A. Yes.

Q. And isn't it a fact that in your opinion you should not have tried to move that equipment without a gate-lift truck?

A. No, it is not my opinion that we shouldn't have tried to move it without it. It is my opinion we should have sent the gate-lift when it was requested. The move was competently performed without it, but I said if a man requested it he should have had it.

Q. Isn't it a fact that you were not equipped for that particular move and that you shouldn't have attempted it?

A. With a gate-lift, I would say yes.

Q. Well, I don't believe you understood my question. Isn't [115] it a fact that you were not equipped to make that particular move and that you should not have attempted it? A. Yes, sir.

Q. Now, as I understand, during the course of this contract the Foster Transfer Company received several verbal and written warnings regarding the poor service which was being given under this contract.

A. That is these letters that have already been—

(Testimony of S. W. Hallam.)

Q. And there were other verbal warnings beside that? A. Yes, sir.

Q. I will ask you whether or not these were ever brought to the attention of Mr. Doolittle?

A. That I can't remember.

Mr. Evans: May I have this marked for identification, please?

(Statement of Sydney W. Hallam, dated July 21, 1949, marked Defendant's Exhibit A-8 for identification.)

Q. (By Mr. Evans): I hand you what has been marked for identification Defendant's Exhibit 8. I will ask you to state whether or not you know what it is. A. I do.

Q. I will ask you whether or not it isn't a statement which is signed by you and given to two agents of the Federal Bureau of Investigation? [116]

A. It is.

Q. I will ask you whether or not your initials appear on the first page? A. They do.

Q. And whether or not your signature appears on the second page? A. It does.

Q. I will ask you whether or not all the information that is contained therein isn't true?

A. I believe it is.

Q. Now, will you refer to the second page, please, about the middle of that page? I believe you will find a statement to the effect that you received numerous verbal and written complaints from Mr. Street and that these were called to Mr. Doolittle's attention. Do you find that? A. Yes.

(Testimony of S. W. Hallam.)

Q. Does that refresh your memory any as to whether Mr. Doolittle was informed of these discrepancies?

A. He was informed through the letters; and he had several—several talks with Mr. Street.

Q. What if any action would Mr. Street take—or Mr. Doolittle take when these complaints were received?

A. Well, he would usually tell me to straighten them out.

Q. Well, now, don't you state there in your statement that these were brought to the attention of Mr. Doolittle by me [117] but he never did a thing about them, he just ignored them completely?

A. That is right.

Mr. Evans: I believe I am entitled to offer Exhibit Number 8, Your Honor—A-8.

The Court: Do you mean by that that you do now offer it?

Mr. Evans: I now offer Exhibit A-8.

Mr. Seering: I haven't read it yet, Your Honor.

(Exhibit A-8 presented to Mr. Seering.)

Mr. Seering: I haven't read the entire statement, Your Honor. The witness, however, on each question to which his attention has been directed to a portion of this statement, has said, yes, he made that statement. The statement covers a good deal of other matter and it would be admissible, I presume, to impeach the witness if he denied he ever made such a statement. He hasn't done that. I object on that ground.

(Testimony of S. W. Hallam.)

The Court: Any response?

Mr. Evans: I believe the statement is not entirely in accord with the oral testimony which has been given and I am using this statement and would like to use it for the purpose of impeaching the witness, Your Honor. [118]

The Court: In what detail in respect to which the offered exhibit does tend to have that effect, that is, impeaching him with respect to anything he orally testified?

Mr. Evans: I find it here, the particular paragraph I am referring to. I don't believe the witness stated the same on the witness stand or even to the same effect in regard to this last question. May I ask the reporter to read the last question and answer, please, which was propounded to this witness?

The Court: You may do that.

(The reporter then read back as follows:

Que. What if any action would Mr. Street take —or Mr. Doolittle take when these complaints were received?

Ans. Well, he would usually tell me to straighten them out.

Que. Well, now, don't you state there in your statement that these were brought to the attention of Mr. Doolittle by me but he never did a thing about them, he just ignored them completely?

Ans. That is right.)

Mr. Seering: There is no issue there.

(Testimony of S. W. Hallam.)

The Court: The Court did not get convinced of the admissibility of A-8, but further examination may be [119] indulged in if counsel feels a reasonable effort will make it admissible.

Q. (By Mr. Evans): Now, was there any attempt on the part of the Foster Transfer Company to train their employees to do their job which they were required to do under this contract?

A. Well, sir, in the trucking industry there just isn't training; and, no, sir, no attempt was ever made.

Q. Now, where were a substantial portion of your casual employees recruited from?

A. Where we could recruit them—from the Teamsters Hall we did, and where we couldn't, we recruited them from the United States Unemployment Service.

Q. What general area of the City would those people come from?

A. You mean where did they live?

Q. Well, I believe you state here in your statement "most of your casual labor came from skid-road." Is that correct? Is that true or isn't it?

A. Yes.

Q. What was Mr. Doolittle's attitude toward the employees?

A. Well, him and I were hardly ever around at the same time.

Q. Well, don't you state in your statement that the men we employed never gave me any trouble,

(Testimony of S. W. Hallam.)

however, they didn't like Doolittle. He was too antagonistic towards them. [120] His attitude in general was bad and he didn't know how to talk to his employees—he treated them like dogs. The men took orders from Hank but with a great deal of resentment. On the whole the working conditions at Fosters' was good if you ignored Hank's attitude?

A. That was what I was told; yes, sir.

Q. And that is what you have stated in this statement? A. Yes, sir.

Q. Now, was a fork-lift truck ever procured for use at the Wallingford warehouse in loading the trucks? A. Yes.

Q. Do you recall how that came about?

A. Yes. We thought that it would expedite the loading of these pallets—pallet boards that the merchandise was on onto the trucks, but the ground out there was too wet to use it, so it couldn't be used.

Q. Did anybody make such arrangements to get such a fork-lift truck?

A. Mr. Doolittle, I believe, did.

Q. Where was it procured from?

A. From the Port.

Q. Was it a government truck?

A. Yes, sir.

Q. Who sent after it? A. I did. [121]

Q. How long did it take you?

A. Oh, about two hours.

Q. And isn't it a fact that you state in your statement here that it took you a half a day to get it?

(Testimony of S. W. Hallam.)

A. And bring it back.

Q. Isn't it a fact that it also took you another half day to take it back?

A. No, sir. If I said that, I was wrong. I don't remember the exact time, to tell the truth. It might have taken me half a day to get it. However, there was no charge made to the government for that. That was strictly on my own.

Mr. Evans: I would like to offer this statement at this time again, that is, Number 8 as being inconsistent with the witness' present testimony.

Mr. Seering: The same objection, Your Honor.

The Court: The objection is sustained. Proceed.

Q. (By Mr. Evans): Isn't it a fact that you state in your statement which you gave to the Federal Bureau of Investigation: "It was mutually agreed by Hank and Mr. Street, and my understanding, and I had to go to ACS to get one, which took me a half a day. When we tried this lift truck it could not be used inasmuch as the rain during the day had softened the earth near the loading dock and the lift truck itself was too heavy. I returned the truck, which [122] took me another half day."

A. I don't remember stating the time. Maybe I did. It might have taken that long.

Q. Now, during the time you were gone, there was nobody to supervise the operations at the Wallingford warehouse, were there? A. No, sir.

Q. Now, in your opinion was the Foster Transfer Company doing a good job on this contract?—an efficient job? A. In my opinion, yes.

(Testimony of S. W. Hallam.)

Q. In all respects?

A. No, not in all respects.

Q. Isn't it a fact that this job could have been done a lot better?

A. This particular one you are talking about?

Q. On the whole?

A. At that time I would say no; now it could.

Q. Well, why couldn't it have been done better then?

A. Because at that time you couldn't get the competent help nor the competent—the good equipment that is available now.

Q. Well, as I understand, then, Foster Transfer just didn't have the men or equipment with which to perform this contract in a proper manner, is that correct? A. Yes. [123]

Q. As I understand, you had had no experience with this particular type of trucking operation at the time you went to work there, is that right?

A. That is correct.

Q. Yet you were put in charge of this particular operation more or less as foreman and supervisor?

A. Yes, sir.

Q. Did you handle any paper work on this contract? A. I handled some of it, yes.

Q. Was the Foster Transfer Company making any money on the contract?

A. That I couldn't say.

Q. Isn't it a fact that you told an agent of the Federal Bureau of Investigation that you couldn't

(Testimony of S. W. Hallam.)

understand why Mr. Doolittle was pursuing this lawsuit because he was losing money on the contract anyhow?

A. At that time I thought he was, but since then I have heard different. When I made the statement, I thought that.

Q. But at the time you were talking with the Federal Bureau of Investigation, it was your opinion that they weren't making any money on the contract?

A. Yes, sir. I can't say, to my knowledge, whether they were or not because I didn't keep the books.

Q. I will ask you whether or not, in your opinion, the Treasury Department—the officials of the Treasury Department [124] were trying to give the Foster Transfer Company a square deal on this contract? A. In quite a lot of instances, yes.

Q. There were no personalities, were there?

A. In my opinion, yes.

Q. Isn't it a fact that you stated before that there were no personalities involved so far as you knew?

A. No, sir. If I did, I didn't mean to. I said between myself and anybody.

Q. Was there proper supervision of the work being done under this contract?

A. There was proper supervision as far as it could go around, but we couldn't send a supervisor on every individual job.

(Testimony of S. W. Hallam.)

Q. Isn't it a fact that you stated before that there was a lack of sufficient supervision on this work? A. Yes, sir; for the same reason.

Q. Now, do you recall an incident where your movers in moving a Mr. Reardon's furniture out of an apartment, the Caledonia Apartments—where they apparently slid a large box down four flights of stairs rather than carrying it and damaging the steps? A. I do, sir.

Q. I will ask you whether or not you made a settlement with the owner of that apartment house for the damage? A. I did, sir. [125]

Q. Do you consider that proper and efficient moving?—to slide a box down rather than carry it?

A. I don't consider it efficient moving; no, sir. But I don't think it is too much the fault of the company. That happens every day. That's the men. That is not the company.

Q. Oh, that is the employees and not the company's fault? A. Yes, sir.

Q. You do not consider that the fault of the company? A. No, sir.

Q. How do you distinguish between the company and the employees?

A. Well, legally yes, they are responsible, but technically no. Any transfer company you get today, the same thing could happen and the company would be responsible for the damage.

Q. Well, do you consider that method of moving a large, heavy box from the fourth floor down

(Testimony of S. W. Hallam.)
to the ground floor a proper method of moving that box?—to slide it along the steps?

A. No, sir; I wouldn't.

Q. Isn't it a fact that on occasions the Foster Transfer Company would send flat-bed trucks instead of vans during inclement weather?

A. Yes, sir. [126]

Q. To carry peoples' furniture?

A. Yes, sir.

Mr. Evans: No further questions.

Redirect Examination

By Mr. Seering:

Q. Mr. Hallam, on cross-examination counsel asked you if there were any personalities involved and you said yes. Will you explain your answer?

A. What I had in mind when I said that—incidentally, I made that in my statement and I see that it is not in there. I am referring to the shelves that were brought up under discussion before. When those shelves—when the argument came out about those shelves, Mr. Street came out to me and started raving and told me Mr. Doolittle just didn't know anything from anything. That night when I got back to the office, why, Mr. Doolittle said the same thing. And that's how it all started.

Q. To your knowledge, had there been any conflicts before with Mr. Street.

A. To my knowledge, no. It all started over the shelves.

Q. Now, on the matter of this gate-lift, you said

(Testimony of S. W. Hallam.)
you were not equipped with a gate-lift. Is it a fact that one was available—owned by someone else?

A. Yes, sir. [127]

Q. Which you used A. Which we used.

Q. And it just happened on this occasion that when you received the call it was not available?

A. That's right.

Q. In regard to the matter of complaints, you said there were no complaints on your end of the Wallingford job? A. That's right.

Q. That was the Wallingford end?

A. Yes, sir.

Q. Who was in charge on the other end of the job?

A. Most of the time Mr. Doolittle—Hank—and the rest of the time his father.

Q. Counsel brought out the fact that some of your employees came from the skid-road. Were those the employees that were recruited through the United States Employment Service?

A. Yes, sir.

Q. Was there any other form of recruiting available to you other than the Teamsters Hall and the Employment Service? A. Not that I know of.

Q. What was the employment situation at that time in June and July of 1945?

A. Very bad, very bad.

Q. You stated that flat-bed trucks were sent out on occasion [128] during inclement weather. What is the explanation of that?

(Testimony of S. W. Hallam.)

A. Well, we didn't have sufficient vans. But we always sent tarps. We had flat-bed trucks with stakes and side boards, and we put tarps on them. But they were flat-bed trucks.

Q. Was it possible to handle the commodities that you handled without damage thereto by weather?

A. Yes. Previously there was an instance I recall of some material getting damaged by water, but I don't remember that.

Q. You do not recall any such instance?

A. No, sir; I don't.

Mr. Seering: That is all.

Recross-Examination

By Mr. Evans:

Q. Now, you stated that you did have a gate-lift truck available?

A. We did not own a gate-lift truck, nor did we have one, but we had one we had been borrowing from another firm.

Q. How do you reconcile that with the following quotation from your signed statement? "I told Hank we shouldn't have told the ACS that we had a lift-gate truck when he knew that we didn't. And he replied that we'd get one. However, the next morning Hank sent a flat bed truck to [129] the ACS office to move the equipment. I believe it was raining that day, but the equipment was covered with canvass. We were not equipped for this particular move and shouldn't have done it."

(Testimony of S. W. Hallam.)

A. In my opinion, Hank gave the man to understand that this gate-lift truck would be available at any time, and at the time we were talking to him I wanted to explain to him that it wasn't ours and would not only be available when not subject to prior use, but that point was never brought out.

Q. Oh! Then as I understand, Mr. Doolittle was representing to this representative of the Alaska Communications System that he owned a truck and would have it available at any time, is that correct? Is that the impression?

A. That was the impression, yes. I don't believe he actually asserted that, but that was the impression.

Q. When, in fact, he would just have to get it whenever the other company wasn't using it, is that correct? A. That is right.

Mr. Evans: No further question.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Seering: So far as I know, I think we are probably ready to rest.

The Court: I wish to proceed at this time. Call your next witness or else rest your case.

Mr. Seering: Plaintiff rests.

The Court: The defendant may now proceed.

Mr. Evans: At this time the defendant moves for dismissal, Your Honor. There has been ample showing by the plaintiff's own witnesses that the

plaintiff did not fully and faithfully perform all things required of it under the provisions of the contract.

Now, that is one of the allegations set out in the complaint.

I believe it has been testified to here by both witnesses that the contract was not fully and faithfully performed. That is one of the allegations here and I don't think it has been proven.

I believe that the plaintiff's action should be dismissed at this time for want of sufficient proof.

The Court: The motion is denied.

Proceed.

Mr. Evans: Now, I would like to make just a brief opening statement.

The Court: You may do that.

(Opening statement by counsel for defendant.)

The Court: Call the Government's first witness.

Mr. Evans: I would like to call Mr. MacInnes.

MALCOLM C. MacINNES

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please?

A. Malcolm C. MacInnes.

Q. Where do you live, Mr. MacInnes?

(Testimony of Malcolm C. MacInnes.)

A. 1416 East 41st.

Q. Will you speak up so we can all hear you?

A. 1416 East 41st.

Q. And is that a private residence or apartment house? A. It is an apartment house.

Q. I will ask you where you are employed.

A. At 1461 East 41st, Seattle.

Q. And in what capacity?

A. Manager of the apartment house.

Q. How long have you been so employed?

A. Well, pretty near seven years at that building.

Q. I will ask you whether or not you recall the time when Mr. Reardon moved out of your apartment back in 1945?

A. Well, I can't recall the very day, but I recall him moving [132] out.

Q. Do you recall what floor his apartment was on? A. Yes, sir.

Q. What floor? A. On the third floor.

Q. Now, I will ask you whether or not you were present at the time his furniture and belongings were moved out of that apartment?

A. Yes, sir; I was present. I was around the apartment at that time.

Q. I will ask you whether or not, as a result of that move, any damage was done to the apartment house? A. Well, yes.

Q. What damage was done?

A. They moved some stuff down the back steps that they didn't carry. They just drug it over the

(Testimony of Malcolm C. MacInnes.)

steps and tore the corners off the steps on the way down.

Q. How many flights down was it?

A. That would be three flights.

Q. Three flights. I will ask you whether or not in the course of your employment as manager of an apartment house you have observed other transfer companies in performing their functions as movers?

A. Yes.

Q. I will ask you whether or not you have observed the [133] methods used by other transfer companies in carrying or moving boxes and furniture, and so forth, in and out of apartment houses?

A. Yes.

Q. Now, from that observation will you state whether or not in your opinion the movement of the articles out of Mr. Reardon's apartment, in the manner you have just described, was in keeping with the common practice of other carriers?

A. No, sir.

Mr. Seering: Objected to. There is not a sufficient foundation for this witness to testify as an expert.

The Court: Overruled. The answer was "no", and it will stand.

Mr. Evans: No further questions.

Mr. Seering: No questions.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Evans: I would like to call Mr. Schwandt. May I ask that Mr. MacInnes be permanently excused? I do not expect to call him again.

The Court: You may be excused, Mr. MacInnes.

HERMAN F. SCHWANDT

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name? And spell the last name, particularly for the purpose of the record.

A. Herman F. Schwandt, S-c-h-w-a-n-d-t.

Q. Are you now employed, Mr. Schwandt?

A. No, I am not.

Q. What is your status?

A. I am a retired civil service employee.

Q. And with what branch of the Government were you employed?

A. I was last employed by the United States Immigration Service.

Q. And how long were you employed by the Government?

A. From August 15, 1924, to July—June 30, 1948.

Q. Now, I will ask you whether or not you were stationed in Seattle during the fall of 1945?

A. I was.

(Testimony of Herman F. Schwandt.)

Q. And what was your position at that time?

A. I was the chief of Detention, Deportation and Parole Section in the Immigration and Naturalization Service.

Q. Now, in that connection I will ask you whether or not you [135] had any duties or function with regard to Japanese aliens which might be shipped into this city for repatriation to Japan?

A. I was in charge of all the moves. I handled all of them.

Q. Now, I will ask you whether, in connection with such a move, you made any request to the Foster Transfer Company for any type of transportation along about October or November of 1945?

A. Yes. I called on them for—to furnish two trucks, and I believe it was—I called them on October 31, 1945, and with the provision that I would furnish them with the exact time later.

Q. And how many trucks did you call for?

A. Two.

Q. And I will ask you whether or not you called for any additional helpers to be along with the trucks?

A. I called for helpers for each of the trucks as well as the drivers.

Q. That would make two trucks, each with a helper? A. That's right.

Q. Now, I will ask you whether or not you later notified the Foster Transfer Company as to the time and place where you would want these vehicles?

(Testimony of Herman F. Schwandt.)

A. I did.

Q. And do you recall when you so notified them?

A. I believe it was on the morning of November 2nd; however, I am not sure. It might have been the day before.

Q. And where did you direct them to report?

A. At the baggage room gate at the Union Station on 5th Avenue South.

Q. And I will ask you to state, what was the purpose in ordering these trucks?

A. To handle the hand baggage of a shipment of 320 Japanese that were coming in that day by special train.

Q. I will ask you whether or not it was necessary to keep these Japanese aliens under guard?

A. Definitely.

Q. I will ask you whether or not you were responsible for the supervision of that security?

A. I was.

Q. I will ask you whether or not you made your plans accordingly as to the amount of security which you would have available?

A. I made my plans in accordance with the number of trucks and busses and other equipment that was ordered.

Q. And I will ask you whether or not the trucks showed up? A. Yes, the trucks were there.

Q. I will ask you whether or not the helpers were there? A. No. There were no helpers.

Q. Now, as a result of there being no helpers,

(Testimony of Herman F. Schwandt.)

I will ask you [137] what, if anything different, that made in your plans for the movement of these Japanese aliens?

A. These Japanese aliens were carrying their hand baggage, and in order to expedite the movement, I had the Japanese place their hand baggage on the tailgate of the truck. This jeopardized the security to some extent inasmuch as we had to move them first right and then back left.

Q. I will ask you whether or not there was very much other traffic around the depot at that time?

A. At 10:30 and 11:00 o'clock in the forenoon on 5th Avenue South it is just one continual stream of traffic.

Q. I will ask you, what were your plans as to the movement of these Japenese aliens when you set up the move and ordered your guards and trucks?

A. To transfer them to the Immigration Station together with their luggage.

Q. And I will ask you what difference, if any, it made to your plans, the fact that the helpers did not arrive?

A. Well, it jeopardized the security and delayed the loading of the Japanese to the——

Q. What were you going to do with them if the helpers had been there?

A. Merely set the baggage on the edge of the curb and move them right on in to the trucks—into the busses, pardon me. [138]

Q. But as a result of the helpers not being there,

(Testimony of Herman F. Schwandt.)
what additional movements did you have to make with these people?

A. We had to move them first to the right of the door, to place their baggage on the tail gate where the two drivers then took the baggage and moved it forward into the truck, and then I had to move them from there, oh, approximately sixty or seventy-five feet to the left to get them into the busses.

Q. I will ask you whether or not such additional movement increased the hazard of any of them being able to escape?

A. Very definitely, because that left me short handed.

Q. I will ask you whether or not the absence of helpers increased the length of time that you had to use the trucks?

A. In the case of one of them, it probably didn't. I think one of those trucks was released in an hour and a half; the other one, why, it was over three hours, or about three hours, as I recall it, before it was released, because of not having sufficient help to get the baggage unloaded.

Q. Now, I will ask you whether or not you reported these facts which you have testified to to Mr. Steele? A. I did.

Q. And Mr. Steele is who? [139]

A. He was chief of the Fiscal Section at the immigration station.

Q. I will ask you whether or not you submitted

(Testimony of Herman F. Schwandt.)
memoranda to him in regard to this transaction?

A. I submitted a memorandum to him when I phoned the transfer company, as to what I had done, that I had phoned them. He then issued a purchase order covering the equipment and the men.

Mr. Evans: You may cross-examine.

Cross-Examination

By Mr. Seering:

Q. Are you sure it was the Foster Transfer Company that was involved?

A. It was the Foster Transfer Company involved. I don't know who sent the trucks.

Q. You say it was the Foster Transfer Company that you phoned?

A. Yes, because I was advised that they held the contract.

Q. You said that had the helpers been there you would simply have set the baggage on the curb and moved the men into the busses?

A. That is correct.

Q. What was to prevent you doing it anyway without the helpers? [140]

A. Because I didn't have sufficient men there to guard the baggage.

Q. Well, how far was the curb from where the trucks were?

A. Oh, they were parked right up to the curb. However, they were down the street from the door. And the busses were the other way.

Q. In other words, the trucks were right there

(Testimony of Herman F. Schwandt.)
and the baggage could have been piled on the sidewalk by the trucks?

A. Not necessarily. The trucks were ahead of the busses, and it was necessary first to have the Japanese move to the right of the door to deliver their baggage and then move them back two truck lengths, or a truck length and a bus to get them onto the bus.

Q. Anyway, the only question involved, had there been helpers there you would have left no one to guard the baggage?

A. Had there been helpers there, it shouldn't have been necessary to guard the baggage. They——

Q. Your answer, then, is "no"?

A. Not necessarily. That is something—that contingency didn't come up.

Q. My question is: Had there been helpers there, you would have left no guards to guard the baggage?

A. No. It wouldn't be necessary. They have it loaded.

Q. It was just a question of two helpers in guarding that [141] baggage that was involved in this situation and you say that affected the security, is that right? A. That is right.

Q. The drivers were there and in plain sight of the baggage at all times, were they not?

A. They were there. I wouldn't say that they were in sight—that they would be in plain sight of the baggage at all times.

(Testimony of Herman F. Schwandt.)

Q. Well, they were as much so as if there had been helpers there? A. No, I don't think so.

Mr. Seering: That is all.

Mr. Evans: No further questions.

The Court: Step down.

(Witness excused.)

The Court: At this time we will take an adjournment until tomorrow morning at 10:00 o'clock.

(At 4:30 o'clock p.m., Tuesday, August 2, 1949, the above entitled matter and proceedings was adjourned to 10:00 o'clock a.m., Wednesday, August 3, 1949.) [141]

Seattle, Washington, August 3, 1949

10:00 o'clock a.m.

(All parties present as before.)

The Court: Are there any other ex parte matters or matters upon agreement to come before the Court? If not, you may resume the trial of the case, Mr. Evans.

Mr. Evans: I would like to call Mr. Steele.

The Court: Come forward.

Mr. Evans: Take the stand, Mr. Steele.

RAY S. STEELE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

(Testimony of Ray S. Steele.)

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please, and spell your last name for the reporter?

A. Ray S. Steele, S-t-e-e-l-e.

Q. Where are you employed, Mr. Steele?

A. In the United States Immigration and Naturalization Service.

Q. How long have you been so employed by that department of [142] the Government?

A. Approximately 18 years.

Q. I will ask you where you were stationed during November of 1945? A. At Seattle.

Q. And what was your position at that time?

A. Chief of Fiscal Services and Supply Section, the District Office.

Q. And I will ask you what your position is at this time? A. The same.

Q. Now, I will ask you whether or not you recall the incident which Mr. Schwandt testified to yesterday in regards to a train load of Japanese aliens coming into Seattle and two trucks being ordered?

A. I do.

Q. And I will ask you whether or not you submitted a purchase order to the Foster Transfer Company for those services? A. I did.

Q. I will ask you if you recall the amount of the purchase order, or the approximate amount?

A. Originally about $24.00.

Q. You say originally about $24. Was there

(Testimony of Ray S. Steele.)

some other purchase order or some change in that figure?

A. It was diminished by reason of the fact that the helpers ordered were not furnished. [143]

Q. How much was it diminished? A. $28.

Q. How much was the invoice you received from the Foster Transfer Company, approximately?

A. Approximately $95.

Q. I will ask you whether or not you made any calls on the telephone in regard to that account to the Foster Transfer Company? A. I did.

Q. I will ask you to state whether or not you gained any satisfaction over the telephone.

A. None.

Q. I will ask you whether or not you ever made a trip to their office? A. I did.

Q. I will ask you whether or not you discussed this matter with the person in charge there?

A. I did.

Q. Do you recall who it was you talked to?

A. I talked to two or three people in the office, but the time was too long ago to be definitely sure. I have had no business connection since.

Q. I will ask you what, if anything, was told to you by the persons in charge of that office with regard to the discrepancy to which you were calling their attention?

A. I do not remember the exact words. But I—the gist of [144] it was that I was informed that it was none of my business how the bill was applied

(Testimony of Ray S. Steele.)

or how the charge was made; that having made—furnished the purchase order, that that was as far as my responsibility went; that it was not necessary for me to be concerned with how the company made the charge to the government.

The Court: Can you give the words that were stated by which you got that impression?

The Witness: "It is no skin off of your nose," or some such matter as that. In general effect, that was the impression I received, that it was no skin off of my nose how the charge was made and why should I be concerned in the amount that was charged or how it was charged.

The Court: You say you do not know who used those words?

The Witness: It was the individual who was responsible for the making of the charge, but what the individual's name was I do not know. I had been referred to the individual who was responsible for determining the charge.

Q. (By Mr. Evans): This took place in whose offices?

A. In the office of the Foster Transfer Company on East Pine Street.

Q. Now, the funds for paying this charge were Government [145] funds?

A. The appropriation of the Immigration and Naturalization Service for the current year.

Q. I will ask you whether or not in your capacity it is your duty to watch over those funds and see to

(Testimony of Ray S. Steele.)

it that they are spent judicially and in the proper manner?

A. That is true, and to secure administrative approval of the voucher and payment.

Q. I will ask you whether or not in making the call to the Foster Transfer Company, which you have just mentioned, you were carrying out those functions and duties? A. Yes, sir.

Q. Now, do you recall approximately how many hours these two trucks were used?

A. I have a copy of the purchase order in my pocket which will give the exact information, but I do not recall.

Q. Is that purchase order a part of your files, kept in your regular, usual course of business?

A. Yes, sir.

Q. I will ask you whether or not that purchase order was prepared by you or under your supervision?

A. It was prepared under my supervision and signed by myself.

Q. Refreshing your memory from that document, can you give us the information as to how long the trucks were used [146] or the approximate time?

A. One truck was used one hour and a half and one truck was used three hours.

Q. It makes a total of four and one-half hours—

A. Yes, sir.

Q. ——that the trucks were used?

And how much was the bill that they submitted

(Testimony of Ray S. Steele.)

to your company? A. $95.25.

Mr. Evans: You may cross-examine.

Cross-Examination

By Mr. Seering:

Q. May I see the documents which you have?

The Court: Counsel may look at those. Have they been marked for identification?

Mr. Evans: No. I have no objection to their being marked for identification if counsel so desires.

The Court: Does counsel so desire?

Mr. Seering: I don't know what they are.

The Court: Let counsel making the request first see them, and after that——

Mr. Seering: I don't care whether they are marked. I have no objection to them, if you want to mark them.

Mr. Evans: It is all in the oral testimony. [147]

The Court: If it is all in the oral testimony, unless one side or the other insists upon it, leave the matter as it now stands.

Q. (By Mr. Seering): Now, as I understand it, Mr. Steele, you drew your purchase order on the basis of a time rate? A. That is right, sir.

Q. And the bill of the Foster Transfer Company was drawn on the basis of a piece rate in accordance with the provisions of the contract; isn't that correct? A. That was their statement; yes, sir.

Q. And you checked up and found out it was true, didn't you? The contract provided for a rate of so much per piece as it was billed to you?

(Testimony of Ray S. Steele.)

A. There was such a provision in the contract, but the order was not placed in that manner.

Q. Well, under the contract the time rate had no application to this job, did it?

Mr. Evans: Well, I am going to object. This is argumentative.

Mr. Seering: If he is——

Mr. Evans: And the contract speaks for itself as to what the rates are.

The Court: The objection is overruled.

A. It was my understanding that the time rate definitely applied as we had no indication of—of the number of [148] pieces or anything else that was to be moved, or where they were actually to be moved at the time the order was placed.

Q. And you paid the bill as rendered, didn't you?

A. No, sir.

Q. And you wouldn't pay it, of course, if it were not correct? A. We declined to approve it.

Q. Well, if it was paid, presumably it was paid because it was correct.

A. I would presume so.

Q. And if our records say it was paid, would you say they were wrong?

A. Well, that would not be for me to say, sir.

Q. You do not know personally whether it was or wasn't paid, do you? A. No, sir.

Q. Then you want to take back your statement that it was not paid? You don't know?

A. I do not know whether it was paid. I simply

(Testimony of Ray S. Steele.)

know that our office refused to add administrative approval.

Mr. Seering: That is all.

The Court: Anything further?

Redirect Examination

By Mr. Evans:

A. I will ask you whether or not the order was placed for [149] these vehicles to be used for a period of time or whether the order was placed to haul specific items?

A. The order was placed for the use of one 6-ton vehicle and one 5-ton vehicle to be at a certain place at a certain time—to be used by our office until released—a time basis.

Mr. Evans: No further questions.

The Court: Anything further?

Mr. Seering: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Evans: I call Mr. Smith.

IRVING D. SMITH

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please, and spell your last name for the reporter?

(Testimony of Irving D. Smith.)

A. My name is Irving D. Smith, S-m-i-t-h. [150]

Q. Where do you live, Mr. Smith?

A. I live on Mercer Island.

Q. And where are you presently employed?

A. With the Civil Aeronautics Administration.

Q. I will ask you whether or not you have ever been employed by the Department of Commerce, Office of Surplus Property? A. I have.

Q. I will ask you whether or not you were so employed on or about August 23, 1945?

A. I was.

Q. I will ask you whether or not at or about that time you had occasion to write a letter to the Procurement Division of the Treasury Department reporting a complaint in regard to services of the Foster Transfer Company? A. I did.

Mr. Evans: May I have this marked for identification, please.

(Letter from Department of Commerce, Office of Surplus Property, Seattle, Washington, to Mr. Chas. Street, Acting Chief, P&S Division, 8th & Lenora, Seattle, Washington, marked Defendant's Exhibit A-9 for identification.)

Q. (By Mr. Evans): You have been handed what has been marked for identification as Exhibit A-9. Will you state whether or not that is the original of the letter which [151] you just spoke of as having sent? A. That is the original.

Q. I will ask you whether or not at the time that

(Testimony of Irving D. Smith.)

you prepared that letter the statements set out in there were fresh in your memory?

A. They were.

Q. Now, in regard to the subject matter of that letter, particularly as to a move which your office contemplated moving on or about the 20th day of August, 1945, do you now personally recall that move? A. Yes, I do.

Q. Now, will you state the day and time when it was originally planned that that move should take place?

A. The statement in the letter is correct, that the——.

Q. Now, you can refresh your memory from the letter, but just tell us what the facts were.

A. All right. The facts were that the trucks—the truck and the equipment were ordered to be at the office from which the move was to be made at 8:30 in the morning of August 20th.

Q. And that was at what location?

A. That was at 2005 5th Avenue.

Q. What building is there; do you recall?

A. I don't think the building has a name. It is a five or six story building now occupied by the telephone company. [152]

Q. Where was it to be moved?

A. It was part of our office. We were occupying the entire building and part of the office was being moved over to the Textile Tower.

Q. Now, I will ask you whether or not any difficulty was encountered in getting a date upon which

(Testimony of Irving D. Smith.)
the Foster Transfer Company would furnish the equipment to make this move?

A. Originally?

Q. Yes.

A. No. The agreement was that they would be there at 8:30 in the morning.

Q. I will ask you whether or not on August 20, 1945, the Foster Transfer Company arrived at your office at 8:30 for the purpose of making this move? A. No.

Q. What time did they arrive?

A. About 2:30—in the afternoon.

Q. In the afternoon. That was on what date, again? A. That was August the 20th.

Q. In 1945? A. Right.

Q. Now, I will ask you whether or not, when the truck did arrive, it had the necessary equipment to perform the move? [153] A. No.

Q. What, if anything, was lacking,—to your knowledge?

A. We had ordered boxes to pack loose materials in that were to be moved with the desks and furniture and there were no boxes when the truck arrived—nothing to pack loose material in.

Q. And I will ask you what, if any, arrangements were then made for the move?

A. The arrangements then were made that they would be back the following morning with the boxes.

Q. At what time? A. 8:30.

(Testimony of Irving D. Smith.)

Q. That would be on what date and what year?

A. That would be on the 21st of August that they were to come back.

Q. 1945? A. The following day. 1945.

Q. And I will ask you whether or not on the 21st of August they arrived?

A. They arrived at 9:30,—an hour late.

Q. An hour late? A. An hour late.

Q. I will ask you whether or not they had the necessary equipment at that time?

A. They had the equipment. [154]

Q. I will ask you whether or not they brought the boxes? A. The boxes, yes, and the truck.

Q. And I will ask you whether or not the move was made on that day?

A. The move was made.

Q. I will ask you whether or not you had occasion to observe the workmen of the Transfer Company in making that move?

A. It was where I could see the move being made; yes.

Q. I will ask you whether or not you took any particular notice of the efficiency with which that move was conducted?

A. Well, in my opinion, it was a very slow move. It took more time than seemed to be necessary.

Q. In what regard? Will you explain what you mean?

A. The move was being made from 2005 5th

(Testimony of Irving D. Smith.)

Avenue to the Textile Tower, about five or six blocks away. It took from 9:30 in the morning until 2:30 in the afternoon to move eight desks, three chairs and three filing cabinets.

The Court: From 9:30 to when?

The Witness: Until 2:30 in the afternoon. The move was completed at 2:30.

The Court: They moved what?

The Witness: Eight desks and chair—eight desks, eight chairs and three filing cabinets, plus some loose odds and ends in boxes. [155]

Q. I will ask you whether or not it was a full truck load of furniture?

A. Approximately filled the truck which they had.

Q. I will ask you whether or not from your observation there was any wasted time on behalf of the employees of the Foster Transfer Company?

A. It appeared to me that there was a good deal of standing around.

Q. Now, I will ask you whether or not the delay on the 20th of August, not arriving until 2:30, caused any inconvenience or any loss to the government, particularly as to the time of the employees of the government?

A. It is always a loss to the government when there is that sort of a situation because employees cannot work at their desks when they have made plans to move; in other words, their working materials are put away. They are either packed or

(Testimony of Irving D. Smith.)

stacked or put in a desk, or something, and the result is that they can't carry on their work while waiting for trucks or while the furniture is being moved.

Q. I will ask you whether or not this was an operating office, or was this just an office where there was just the desks?

A. This was an operating office. All our offices were operating offices. I do not recall at this time what particular function was being performed, or what particular [156] part of the organization was being moved. But all of the work that was being performed was about—was of an operational nature.

Q. Now, I will ask you whether or not Exhibit A-9 is the formal complaint which you rendered in regard to the matters to which you just testified? A. It is.

Mr. Evans: We will offer Exhibit A-9.

Mr. Seering: The plaintiff has no objection.

The Court: Admitted.

(The letter heretofore marked as Defendant's Exhibit No. A-9 for identification was received in evidence.)

Mr. Evans: I have no further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Seering:

Q. Mr. Smith, what experience in moving have

(Testimony of Irving D. Smith.)
you had which would qualify you to say that the time consumed, from 8:30 to 2:30, to move eight desks, eight chairs and three filing cabinets, plus the contents, packing them and so on, was too long?

A. I have had approximately 15 years of Federal Government experience, all of which has been in the nature of an [157] administrative capacity. At certain times I have been in complete administrative charge of large government offices. The government is always on the move due to the increase or decrease of appropriations. There is always expansion or contraction going on, and I think probably the government moves more than any other type of business. Every few months there is a move where trucks are employed.

Q. And on every one of those moves you, of course, timed them and determined whether it was too long or whether it was proper as to the time consumed?

A. No, sir; but the thing falls into a pattern after a certain number of years.

Q. All right. Now, on this particular job it was necessary to use the passenger elevator, wasn't it?

A. That is right.

Q. And that could accommodate only one desk at a time? A. Perhaps. I don't recall.

Q. You don't know that?

A. I don't know that.

Q. And it wasn't——

(Testimony of Irving D. Smith.)

A. May I correct that statement? I am sure that we could carry more than one desk at a *time.* One desk might only fit into the elevator, but they certainly could be stacked two high. [158]

Q. You are not sure of that, are you?

A. I am sure of that.

Q. You are sure they could be stacked two high?

A. I am sure they could be stacked two high.

Q. That, of course, would increase the danger of damaging them? A. Not in my opinion.

Q. And that passenger elevator was not continuously available, was it? You had to keep the flow of passengers in the building going, too, at the same time? A. That is correct.

Q. So that would be a factor in determining the length of time used in the move, wouldn't it?

A. Not particularly, because the passengers in the building were largely employees who go to work at eight o'clock in the morning, for example, and are through at twelve, and during the hours in between the elevator was not busy.

Q. Well, what I am asking is whether or not the elevator was used also to accommodate the passengers? A. I said that it was.

Q. It was? A. Yes, sir.

Q. So that it was necessary to accommodate the freight move to the simultaneous use of the elevator for passengers as well? [159]

A. That is right.

Q. And that was a factor determining the length of the move? A. That is right.

(Testimony of Irving D. Smith.)

Q. Now, it is not an obligation under this contract for the contractor to furnish boxes in which to pack the contents of desks, is it? Or do you know?

Mr. Evans: I am going to object to that question. I think the contract speaks for itself.

The Court: The objection is overruled.

A. I don't know. All I know is: Boxes were ordered and agreed to be delivered.

Q. They were agreed to be delivered on the 2nd day as a special accommodation to you, is that correct? A. No, sir.

Q. They didn't have them the first day?

A. That is right.

Q. And they informed you it is not customary for the drayer or trucker to furnish those?

A. No, I don't recall any such thing.

Q. You do not recall that? A. No, sir.

Q. And they were furnished the 2nd day?

A. That is right.

Q. Now, did you write this letter at Mr. Street's solicitation?

A. I don't know. I have no recollection of the circumstances. [160] That's four years ago and I don't recall the circumstances.

Q. He had talked to you, had he, about the services of Foster Transfer?

A. I had talked to him.

Q. You had talked to him? A. Yes.

Q. And you do not remember whether he solicited the letter or not?

(Testimony of Irving D. Smith.)

A. No, sir; I don't remember.

Mr. Seering: That is all.

Redirect Examination

By Mr. Evans:

Q. The Textile Tower, does that have a freight elevator?

A. I believe it does, or a service elevator. I wouldn't be sure of that.

Q. So as to the move into the Textile Tower, there would be no tie-up on elevators there?

A. There shouldn't be.

Q. Do you recall whether or not that freight elevator is a large one?

A. In the Textile Tower?

Q. Yes.

A. I am sorry, I don't recall that Textile Tower elevator. [161]

Mr. Evans: No further questions.

Recross-Examination

By Mr. Seering:

Q. Do you remember whether there were facilities for one or more trucks at a time at the elevator? A. Which elevator?

Q. Well, whatever elevator you used.

A. You mean at 2005 5th Avenue?

Q. You are the one who was there.

A. I don't know which building you have reference to. You mean 2005?

Q. The Textile Tower.

(Testimony of Irving D. Smith.)

A. I do not know anything about the Textile Tower. I wasn't at that end of it.

Q. So then you are testifying as to what you considered the proper length of the job and you now tell me you weren't at the other end. You know nothing of the difficulties encountered there at all? A. That is correct.

Mr. Seering: That is all.

Mr. Evans: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness. [162]

Mr. Evans: I call Mr. Hatfield.

RUSSELL C. HATFIELD

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please? And spell your last name for the reporter.

A. Russell C. Hatfield, H-a-t-f-i-e-l-d.

Q. And where are you employed, Mr. Hatfield?

A. Veterans Administration.

Q. Where were you employed during December of 1945, and January of 1946?

A. With the Treasury Department, Procurement Division.

(Testimony of Russell C. Hatfield.)

Q. In what capacity?

A. As a warehouseman.

Q. And I will ask you whether or not you recall the move which was made by the Procurement Division from their warehouses up here on 8th Avenue and Wallingford down here to South 1st?

A. I do.

Q. And I will ask you whether or not you had any duties with regard to that move? [163]

A. I did.

Q. I will ask you whether or not at any time you had any duties at 8th and Lenora where one of the warehouses was located from which a move was being made? A. I did.

Q. I will ask you to state just briefly: What was the nature of your duties at that point?

A. My duties were to supervise or see that the stock or the merchandise was moved in the proper numerical sequence from 8th and Lenora to the warehouse at 1st Avenue South. It has to be moved in the numerical manner so it can be restacked or restored in the same manner.

Q. I will ask you whether or not that is for the purpose of keeping your inventory straight so that you could find something after the move was over?

A. That is right; it is.

Q. Now, I will ask you whether or not the Foster Transfer Company had any employees at that location at 8th and Lenora?

A. They did.

(Testimony of Russell C. Hatfield.)

Q. I will ask you whether or not you had occasion to observe these employees while they were working? A. Yes.

Q. I will ask you whether or not you observed any of the employees who appeared to you to have been drinking? [164] A. Yes.

Q. I will ask you what observations you made that caused you to arrive at that conclusion?

A. Well, there was one in particular that I noticed was drunk on the job.

Q. What were his actions? What did you see or hear or smell that would give you that impression?

A. Well, just the natural observation of the man being drunk. He was arrogant, conceited and a braggard.

Q. I will ask you whether or not you had occasion to smell his breath?

A. I don't recall, but it wasn't necessary in this case.

Q. Now, I will ask you whether or not this particular individual whom you say was drunk did his share of the work during that day?

A. No.

Q. And I will ask you whether or not at the end of the day you were requested by some employee of the Foster Transfer Company to sign the time card? A. I was.

Q. And I will ask you whether or not you agreed to sign the time card? A. I did not.

(Testimony of Russell C. Hatfield.)

Q. I will ask you whether or not you stated at that time to the employee of the Foster Transfer Company the reason [165] why you would not sign the time card?

A. I wouldn't sign for the man who was drunk.

The Court: He asked you if you stated your reason, and your answer should be yes or no.

A. Yes.

Q. Now, will you state what you told that employee of the Foster Transfer Company?

A. I stated that I would not sign for the time of an employee who was drunk.

Q. I will ask you whether or not the employee who was drunk overheard that conversation?

A. Yes.

Q. And what, if any, action did that particular employee who was drunk take at that time?

A. Well, he hit me.

Q. And where did he hit you?

A. On the left shoulder blade.

Q. I will ask you whether or not any of the other employees for the Foster Transfer Company took any action to stop the altercation?

A. Yes.

Q. I will ask you whether or not you had asked this particular employee to sweep the floor?

A. I don't recall any such request.

Q. And I will ask you whether or not during the course of the [166] day there was an even flow of work for the Foster Transfer Company employees? A. No.

(Testimony of Russell C. Hatfield.)

Q. What occasioned that uneven flow of traffic?

A. Due to the trucks not being there at all times.

Q. Now, were these employees who were there, were they loading or were they truck drivers, or just what were they?

A. Well, there was a truck driver and several employees,—I don't recall how many. But when the truck would come in, why, they would load it.

Q. And would there be another truck waiting when that one was loaded?

A. Yes,—sometimes; not at all times.

Q. What would happen when there were no trucks there?

A. Well, the men would have an opportunity to go out of the building or stand around or stand by.

Q. I will ask you whether or not there was any time lost in that regard? A. Not a great deal.

Q. I will ask you whether or not there was anybody from the Foster Transfer Company supervising the employees of the Foster Transfer Company at that location?

A. Well, I presume there must have been some sort of a supervisor there. There were other men who had supervisor capacity and who were in and out during the day. [167]

Q. I will ask you whether or not any of the supervisors of the Foster Transfer Company at any time during the day took any action with regard to this one man whom you say was drunk?

A. No.

(Testimony of Russell C. Hatfield.)

Mr. Evans: You may cross-examine.

Cross-Examination

By Mr. Seering:

Q. You were with the shipping or receiving end on this move?

A. Well, in this case it was the shipping end.

Q. The shipping end. And you just testified that there weren't always trucks available so that the men did have time. Now, that of course depends on problems encountered on the receiving end, does it not? A. Yes.

Q. The speed with which they can unload?

A. Yes.

Q. You, yourself, are not qualified to testify as to what was encountered there on the move?

A. That's right.

Q. And if the trucks were all bunched up at one end, that, of course, would cause a bottle-neck on the job, too? A. Yes.

Q. And it is ordinarily true that you can't regulate them [168] exactly so that there is one at each end at all times, isn't that right?

A. That is right.

Mr. Seering: Well, I am going to object to this line of testimony. I do not believe that this man is qualified to testify as to a trucking operation.

The Court: Objection overruled.

Q. (By Mr. Seering): Now, on this incident with this employee, do you recall that Mr. L. H. Doolittle called the representative of the Teamsters

(Testimony of Russell C. Hatfield.)

union down there and that he was there, Mr. Al Crowder was there at the time this altercation took place?

A. He wasn't there at the time it took place. He was there afterward.

Q. How long after?

A. Well, I have no idea of the length of time.

Q. Approximately.

A. Oh, an hour, approximately,—half an hour.

Q. Anyway, they did do something about it almost immediately? A. Well, yes.

Q. And the man was discharged, wasn't he?

A. I don't know.

Q. You did not see him around there any more?

A. Well, it was late in the evening, so naturally my time [169] was up.

Q. Well, was he there the next day?

A. No, he was not.

Mr. Seering: That is all.

Mr. Evans: No further questions.

(Witness excused.)

Mr. Evans: I would like to ask if Mr. Hatfield, Mr. Smith, Mr. Steele and Mr. Schwandt can be permanently excused. I do not expect to have to call them again.

Mr. Seering: No objection.

The Court: It is so ordered. The request is granted.

The court will be at recess for 10 minutes.

(Whereupon, a 10-minute recess was taken.)

The Court: I would like to ask counsel if they think we can finish this trial by noon?

Mr. Evans: I am confident that we cannot, Your Honor. I have four or five more witnesses.

The Court: I will request that counsel on both sides be brief in the scope of their examination. I have no objection to your calling that number of witnesses, but be direct and to the point and avoid the use of a plural question where one may suffice. You may proceed. [170]

Mr. Seering: If Your Honor please, Mr. Doolittle received a wire from Alaska last night and it is imperative that he return. He tried to get a reservation this evening, and he can't. He has one at 1:00 o'clock on the plane. I just want to know whether counsel has any objection to his being excused. I want him here, but we can't afford to have him remain.

The Court: If the occasion for rebuttal was now present, it might be appropriate to give it now.

Mr. Seering: May I confer with him now?

The Court: You may do so. Or you may postpone it to the deadline for him to leave the courtroom.

Mr. Seering: I will try and discuss it with him while the examination goes on.

The Court: Call your next witness.

Mr. Seering: Mr. Winder.

ARTHUR R. WINDER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name? And spell the last name for the Court, please.

A. Arthur R. Winder, W-i-n-de-r. [171]

Q. Where are you employed, Mr. Winder?

A. Bureau of Federal Supply.

Q. And was that formerly the Procurement Division of the Department of the Treasury?

A. That is right.

Q. How long have you been employed with that organization? A. Since August, 1944.

Q. Now, I will ask you in what capacity you were working during September, 1945 and January, 1946?

A. I was chief of the Receiving and Issuing Unit.

Q. Now, that is in regard to the warehouses of the Procurement Division? A. Yes, sir.

Q. And I will ask you whether or not you recall the move which was made by the Treasury Department from their warehouse out here in Wallingford down to 1st Avenue South? A. Yes, sir.

Q. I will ask you whether or not you were present at the Wallingford warehouse during this move?

A. Yes, I was.

(Testimony of Arthur R. Winder.)

Q. And what was your function there at that time?

A. I was in charge of seeing that the material was moved out in the proper order and proper condition.

Q. And I will ask you whether or not that was for the purpose of getting the merchandise out of this warehouse and into [172] the next one in some sort of sequence so that your inventory would be in order at the new location?

A. That is right.

Q. I will ask you whether or not any officials of the Foster Transfer Company came down to look at the warehouse prior to the move?

A. The only person I observed was Mr. Hallam who came down with some other person who was unidentified to me, and he went through the warehouse very briefly with me. I don't think he spent more than 15 minutes in the warehouse at that time.

Q. I will ask you whether or not you observed the operations of the Foster Transfer Company at the Wallingford warehouse during this move?

A. Yes, I did.

Q. Now, I will ask you whether or not the men who loaded the trucks were on time every morning during this move?

(Testimony of Arthur R. Winder.)

A. As far as I know, they were.

Q. I will ask you whether or not you would ever receive any calls from Mr. Hallam as to whether or not the men or the trucks were there?

A. Yes, sir. Very frequently he would call in the morning or come later in the morning himself, and he would ask how many men had showed up for work and also how many trucks had showed up.

Q. And I will ask you whether or not the trucks were always there? A. No, sir; they were not.

Q. I will ask you whether or not there were any delays in the trucks arriving in the morning?

A. Yes, there were.

Q. About how long were those delays?

A. It is difficult to remember at the particular time, but there were several mornings when there were no trucks at all the first thing in the morning.

Q. Do you recall how long it took to make this move? A. Approximately 30 days, I believe.

Mr. Seering: Beg pardon?

The Witness: I believe it was approximately 30 days. I am not positive.

Q. (By Mr. Evans): I will ask you whether or not any officials of the Foster Transfer Company came to you to find out where their trucks were?

A. Yes. Mr. Hallam was called very—called very frequently and wanted to know how many trucks had showed up that morning and how many trucks had come back.

Q. I will ask you whether or not there was any

(Testimony of Arthur R. Winder.)
supervision of the men working at the Wallingford warehouse?

A. No constant supervision. Mr. Hallam showed up occasionally, but never stayed for any long period of time at all. [174]

Q. I will ask you whether or not at any time it was necessary for you to take over the supervision in order to get the job done?

A. I had more or less the crew that was loading the trucks to haul out to the motor trucks. I had, more or less, to watch them all the time myself.

Q. I will ask you whether or not the same personnel of the Foster Transfer Company reported out there to work every day?

A. As I recall now, there was only one person that showed up every day. It fluctuated.

Q. I will ask you whether or not there was any turnover in the other personnel?

A. In our personnel?

Q. No, in the other personnel of the Foster Transfer Company.

A. Yes. There seemed to be a new crew there almost every morning, or at least there was very frequent changes, I know.

The Court: What length of time would you say the doing of the job by the plaintiff company covered? How long a period of time was consumed or elapsed while the plaintiff was engaged in doing this job, the plaintiff, Foster Transfer Company?

The Witness: I don't recall the exact dates now.

(Testimony of Arthur R. Winder.)
I say I think it was approximately 30 days on a calendar [175] basis.

Q. I will ask you whether or not this new personnel that showed up quite frequently in any way delayed the job by virtue of having to be informed as to what was to be done?

A. Not at that end, no.

Q. I will ask you whether or not from your observation the loading of the trucks was done properly and efficiently?

A. As far as that was concerned, I would probably say efficiently, but not according to our standards, however.

Q. In what regard was it not done according to your standards?

A. We requested the material be put on the trucks in item number as we took it out of the warehouse. That was not done. It was loaded the way the driver at the time desired it to be done.

Q. I will ask you whether or not there was any dropping of the merchandise?

A. Yes. There was considerable rough handling of the merchandise in loading on the trucks.

Q. I will ask you whether or not that caused any inconvenience or expense to the government?

A. Yes. After we returned to the other warehouse, there was a considerable amount of recouping to be done on a large number of the cartons.

Q. And that recouping—I presume that means reboxing [176] was occasioned by what?

(Testimony of Arthur R. Winder.)

A. I would say the careless handling on the trucks.

Q. I will ask you whether or not there was an even flow of trucks so as to keep the men at the warehouse busy? A. No, there was not.

Q. Can you estimate the time lag between trucks during which the crew would not be working?

A. Well, there was sometimes as much as two hours and on at least three occasions I was able tó make a trip from the Wallingford warehouse to the 1st Avenue warehouse and return and still no trucks had shown up.

Q. About how many men would be working at the Wallingford warehouse on this loading operation?

A. I believe there was six at the beginning, but that force was gradually reduced to three, I believe, at the end.

Q. Now, I will ask you whether or not it was necessary to put a government truck on the job in order to expedite it up so that it could be completed in time? A. Yes, it was.

Q. And what kind of truck was that that the government put on?

A. We had a ton-and-a-half van.

Q. I see.

The Court: Speak as distinctly and clearly as you can so that all present can hear you. [177]

Q. I will ask you whether the driver of that truck was a government employee or a Foster Transfer Company employee?

(Testimony of Arthur R. Winder.)

A. He was a government employee.

Q. Now, I will ask you whether or not the Foster Transfer Company was using vans or flat-beds?

A. They were using flat-bed trucks.

Q. I will ask you whether or not it is necessary —whether or not it was necessary for the government to loan the Foster Transfer Company any tarpaulins or other equipment?

A. Tarpaulins, yes.

Q. I will ask you whether or not after this move was completed there was any evidence of pilferage during the move?

A. Yes, quite a bit, especially in the matter of small hand tools, things such as pliers and other tools.

Q. I will ask you just to describe briefly what kind of merchandise this was that you were moving from one warehouse to another.

A. It was mostly items of a stationery nature, paper, file folders, and things of that nature. There was also a considerable amount of dry goods.

Q. What do you mean by dry goods?

A. Cheese cloth and sheeting; and there was things such as paper towels, toilet paper. We had paint items and some medical supplies, and a few items of—along a chemical [178] line such as photographic preparations, and things such as soaps and things of that nature; in other words, miscellaneous freight.

(Testimony of Arthur R. Winder.)

Q. I will ask you whether or not there were any tools—things of that nature?

A. Yes, there was a number of small hand tools.

Q. I will ask you whether or not during the course of this move the warehouse was able to fill the requisitions which were received?

A. No, we were not.

Q. In other words, your operation, so far as supply is concerned, was stopped during this move?

A. That is right.

Q. I will ask you whether these observations which you made were reported to your superior, Mr. Street?

A. I told—told it verbally to Mr. Sbinden who was my immediate chief at that time.

Q. Now, from all of your observations of the operations of the Foster Transfer Company at Wallingford warehouse, would you say that the job was being done properly or improperly?

A. I would say, over all, it was done improperly.

Q. Now, I will ask you whether or not on other occasions prior to this move you ever had occasion to use the services of the Foster Transfer Company under this contract? [179] A. Yes, we did.

Q. And what would those occasions involve?

A. They usually involved hauling material from a car siding—from a car or from a steamship dock.

Q. To where?

A. To our warehouses either at Wallingford, 8th Avenue, or occasionally to 1st Avenue South.

(Testimony of Arthur R. Winder.)

Q. I will ask you whether or not that was a rather frequent occurrence?

A. No. We didn't use them any more than we had to. I think we used them approximately nine or ten times.

Q. I will ask you whether or not on those occasions the trucks which you ordered showed up on time?

A. Very seldom. They practically never did.

Q. I will ask you what if any action was taken by any of the officials of the Foster Transfer Company to remedy that situation?

A. None that I know of.

Q. How would you order these trucks—call up, write them a letter, or what would you do?

A. By telephone, usually, to Mr. Hallam.

Q. And on any occasions would you call back when the trucks didn't arrive?

A. Invariably when the truck would not show up at the time, [180] we would check back to see what had happened.

Q. And when you called back, I will ask you whether or not the person answering the phone knew anything about the first call?

A. Very frequently they would not.

Q. In other words, from your observations will you state whether or not it appeared that they had any proper record of their dispatches?

A. It was apparent from the conversation with the gentlemen who called himself the bookkeeper at

(Testimony of Arthur R. Winder.)
the Foster Transfer that Mr. Hallam who took care of the dispatching, who had knowledge of the move, had not told anybody else about it.

Q. I will ask you whether or not on those occasions Mr. Hallam would come out to the warehouse?

A. Yes, he did—on several occasions. He would come out to the warehouse and ask if the truck had showed up with the merchandise yet.

Q. And on those occasions had the truck shown up? A. No.

Q. What if any action would Mr. Hallam take then?

A. Well, he usually—I don't know what he did then. Of course, he went out and seen what action he could take to get the trucks in there.

Q. Now, I will ask you whether or not you had occasion to use [181] other trucking firms before this contract with Foster Transfer Company was made, and since then? A. I have.

Q. I will ask you whether or not you have had any complaints to the services rendered by other firms?

A. There has been some complaints, but not to the extent that we had with the Foster Transfer.

Q. I will ask you whether or not the other trucking firms are able to have their trucks there on time?

A. Yes.

Q. And I will ask you whether or not that was the situation with the firm which had the contract

(Testimony of Arthur R. Winder.)

prior to the time Foster Transfer had the contract?

A. Yes, sir.

Q. And I will ask you whether or not that has been the situation with the trucking firm which has had the contract since Foster's contract was canceled? A. Yes.

Q. Will you state whether or not all of these discrepancies which you have mentioned here were reported by you to your superiors?

A. Yes, sir.

Mr. Evans: You may cross-examine. [182]

Cross-Examination

By Mr. Seering:

Q. Were you requested to report them to Mr. Street?

A. I did not report them to Mr. Street. I reported them to Mr. Sbinden.

Q. You were requested to report them?

A. He was my superior and, naturally, I turned all my information over to him.

Q. Were you requested to?

A. It was my duty.

Q. Were you requested?

A. I told him on my own initiative.

Q. Were you asked before this job started to watch it particularly for the performance of Foster Transfer? A. No, sir.

Q. Now, are you aware that before this job was taken that Mr. Doolittle and Mr. Browne—do you know Mr. N. C. Browne who was an employee of the Treasury Procurement Division?

(Testimony of Arthur R. Winder.)

A. I know Mr. Browne. Whether he is the one referred to now——

Q. Were you there when he and Mr. Doolittle went over this job quite extensively before it was awarded to the Foster Transfer? [183]

A. I don't recall that.

Q. You do not know anything about that?

A. No.

Q. Now, you testified that according to your recollection this took 30 calendar days. Do you know that the actual working days consumed on the job were 13?

A. I don't have access to those records. I couldn't say.

Q. And you wouldn't question that figure, however?

A. I am in no position at this time to do so.

Q. And do you know that for three days the job was tied up because of weather—by mutual agreement between Mr. Street and the Foster Transfer Company?

A. I don't believe that is true. I don't recall any day when there was no activity of any trucks whatsoever.

Q. Do you know that the job was tied up for several other days by an elevator failure?

A. I don't know of any day when there was any trucks that did not move at some time during the day.

Q. You do not know about any elevator failure?

(Testimony of Arthur R. Winder.)

A. I heard about that. That is true.

Q. How long did that tie up the job?

A. I do not know. I was not down at 1st Avenue and I don't know the time taken up.

Q. As far as you could see from your observation, any delay was entirely attributable, then, to the Foster Transfer Company and its employees, is that right? [184] A. I would say yes.

Q. There were no excuses of any kind for delay on their part, as far as you could see?

A. Will you explain that question again?

Q. I just asked you whether there were any excuses such as weather or elevator failure or difficulty in loading facilities that would excuse delay —that you could see? A. No.

Q. Now, as to pilferage. You, of course, don't know who pilfered the articles? A. No, sir.

Q. You don't know whether it might have been other government employees or the employees of this company? A. No, sir.

Q. Pilferage is, of course, a common thing in moves of this nature, isn't it?

A. This is the only time we have moved that I have encountered pilferage.

Q. Beg pardon?

A. This is the only time I have had any knowledge of that.

Q. Did you file any claims for pilferage against the company? A. No, sir; I don't believe so.

Q. You testified as to the question of the stop-

(Testimony of Arthur R. Winder.)

ping of the issuing of articles out of stock during this move, did you? [185] A. Yes.

Q. Isn't it a fact that you did not, and that was another factor that held them up in making the move? A. Will you explain that, sir?

Q. I say, is it not a fact that you did not stop issuing out of stock and that was a factor in making the move? A. We did stop issuing.

Q. You say you did? A. We did.

Q. How many complaints do you know of against the City Transfer?

A. Against the City Transfer?

Q. Yes. They were the company who had this contract immediately preceding and immediately following the Foster Transfer period of performance, isn't that correct?

A. Personally, I know of no serious case at all.

Q. Do you know of any?

A. Nothing of any—nothing serious at all, no.

Q. How many? Could you just give us a round figure? A. What?

Q. How many claims did you hear of — complaints?

A. Total complaints against City Transfer?

Q. Yes. A. I have heard of none myself.

Q. You don't know of any? [186] A. No.

Q. As far as you know, this is the only incident where you had any close contact with the Foster Transfer Company?

A. That is right, except on hauling from the cars to the docks.

(Testimony of Arthur R. Winder.)

Mr. Seering: No further questions.

Redirect Examination

By Mr. Evans:

Q. In regard to the pilferage, I will ask you whether or not any of your personal belongings were taken during this move from your desk?

A. Yes, they were.

Q. I will ask you whether or not, other than the Foster Transfer employees, if there were any other people around the warehouse who were not there before? A. No, sir.

Q. I will ask you whether or not these personal belongings from your desk disappeared during the time that the Foster Transfer employees were there?

A. They did.

Q. Now, in regard to the pilferage of the items of stock, I will ask you whether or not you have had any other experiences with pilferage on the same scale as that during this move? [187]

A. No, sir.

Q. Can you explain a little more in detail the nature of the items which were pilfered?

A. As I say, they were things like pliers, screw drivers and small hand tools of that nature. We usually found that they would come in small individual boxes, and the box would be open and they would be taken out and the cover replaced.

Q. I can't hear you.

A. Usually you found it in little individual boxes such as pliers come in, where the material would be

(Testimony of Arthur R. Winder.)
removed from the box and the cover replaced and an empty box left in the file.

Q. Were you able to discover that immediately upon completion of the move?

A. No, we could not.

Q. I will ask you whether or not you found that sort of a situation to exist at any time prior to the move? A. No, sir.

Q. I will ask you whether or not you found that situation to exist at any time since the move?

A. No, sir.

Mr. Evans: No further questions.

Mr. Seering: That is all.

(Witness excused.) [188]

The Court: Call your next witness.

Mr. Seering: Your Honor, at this time I would like to call Mr. Doolittle for just a couple of questions.

The Court: Mr. Doolittle is called back. Is this a part of the plaintiff's case?

Mr. Seering: No. This will be rebuttal.

The Court: Mr. Doolittle is called out of order for rebuttal. You may come forward.

REBUTTTAL EVIDENCE FOR PLAINTIFF
(Out of Order.)

L. H. DOOLITTLE

recalled as a witness by and on behalf of the plaintiff, further testifies as follows:

(Testimony of L. H. Doolittle.)

Direct Examination

By Mr. Seering:

Q. Mr. Doolittle, as far as you can tell, and you have checked your records as I understand it, what was the total number of individual jobs performed by your company under this contract?

A. Well, I haven't the exact total with me here, but it was between 12 and 1400.

Q. Now, on this Wallingford job, did you have any complaints or any argument with the Procurement Division of the Treasury Department after it was completed? [189]

A. The only complaint which we had, or discussion we had over it was that there was—were some hours for labor which they did not think were right and some hours for truck time which they did not think was right, and we discussed aloud those and they came to a total of $161.

Q. Out of a total of what?

A. Approximately 500.

Q. Now, out of those instances that occurred, do you have any record here illustrating the type of complaint and difference that you had?

A. They are all there.

Q. Which file is it?

The Court: Let him have all of the files, if they can be handled.

While the witness is looking for that material, Mr. Reporter, will you read all of the questions and answers since he resumed the stand?

(Testimony of L. H. Doolittle.)

(The reporter then repeated the requested questions and answers.)

The Court: You may continue.

Q. (By Mr. Seering): Refer to your records and without going into detail just classify them as to type of complaint involved.

A. Well, the first one was a truck which was ½ hour late, a disallowance of $2.50; another one was two men did not [190] arrive on the job, $4.50; two men reported at 8:45 instead of 8:00 o'clock, disallowed $2.25.

Q. Excuse me. Does that represent in general the type of difference that you had with the Procurement Division? A. That's right.

Q. I want to save time and I will not go into them all. Will you explain to the Court how you base your charges? In other words, how does a complaint—how can a discrepancy like that occur?

A. Well, on a job like this, if a man doesn't show up we can't force him to. And ordinarily our men turn in their time and we pay those men the union scale for a day's work.

Q. Now, when you say they turn in their time, that voucher or whatever you call it, is that signed by the government inspector on the job?

A. That is right.

Q. And do you have the vouchers covering this job here? A. I do.

(Testimony of L. H. Doolittle.)

Mr. Seering: Mark this.

(Work tickets for men and trucks marked Plaintiff's Exhibit No. 5 for identification.)

The Court: Now, will you in one phrase state what these vouchers are for? [191]

The Witness: Those are the work tickets for men and trucks which were signed for by the government man on the job as billed on the invoice.

The Court: Are these valid items for which your company received payment or are they items in respect of which the government claimed a reduction from our statement of amounts due to the government?

The Witness: No, those are items on which we received payment and we, ourselves, on our own behalf, allowed these deductions after they were signed for on those tickets.

The Court: Do you mean that these items in this Plaintiff's Exhibit No. 5 are included claims by the government for deductions or refunds on account of wrongful billing or wrongful payment?

The Witness: No, sir.

The Court: Well, I would like you to bring out what they are. If you could ask the Witness a question and let him by one word or one phrase state what the nature of this exhibit is——

Mr. Seering: I will, Your Honor.

Q. (By Mr. Seering): Are these the work sheets, all the work sheets covering the Wallingford move? A. Yes.

(Testimony of L. H. Doolittle.)

Q. And are all of them signed by the government inspector [192] on the job? A. Yes.

Q. And those items for which a disallowance was claimed by the Treasury Procurement Department, were your charges based upon a work sheet signed by a government inspector? A. Yes.

Q. Do you have any other way of determining the accuracy of the work sheets unless you have yourself or someone on your behalf on the job every minute? A. No.

Mr. Seering: I will offer the work sheets in evidence.

Voir Dire Examination

By Mr. Evans:

Q. As I understand, all these vouchers are signed by some government officer on the job?

A. That is right, sir.

Q. Now, a number of these were disallowed, isn't that correct?

A. No. That total amount—the hours which were disallowed are on these sheets and the total in dollars and cents was $106.63.

Q. Well, you have there——

Mr. Seering: We haven't offered them yet.

Mr. Evans: I think the two of them should go in [193] together.

Mr. Seering: I have no objection.

The Court: Let the next one be marked Plaintiff's Exhibit No. 6.

(Testimony of L. H. Doolittle.)

(Voucher No. 11-3237 with Deduction Sheets marked Plaintiff's Exhibit 6 for identification.)

The Court: Will some one give the witness an opportunity to characterize Plaintiff's Exhibit 6 in accordance with the nature of the subject therein dealt with?

Mr. Evans: Well, I believe we can stipulate as to what that is.

Mr. Seering: Well, if he will just tell us. I am not sure that I can accurately.

Q. (By Mr. Evans): Will you tell us what Exhibit 6 is?

A. That is the voucher and our invoice which we tendered to the Treasury Department for payment, with a list of deductions and disallowances which the Treasury made.

The Court: Well, is it a correction of Plaintiff's Exhibit 5?

The Witness: No, sir.

Mr. Seering: No, Your Honor.

The Court: You may proceed.

Mr. Evans: Does Your Honor have the question in [194] regard to it? I do not understand what it is. If Plaintiff's Exhibit 5 represents the invoices which he tendered to the government, this is either a corrected invoice, apparently, or else it is a claim for deductions originating with the government and put forth by the government.

(Testimony of L. H. Doolittle.)

Mr. Seering: Well, I think it is the latter.

Q. (By Mr. Seering): Is that correct? Is your voucher requesting payment of the total amount of these work sheets? A. That is right.

Q. And attached to it is the government's claim for deductions on account of men not being there or trucks not being there? A. That is right.

The Court: Well, you said that Plaintiff's Exhibit 5 consisted of vouchers for work done on the Wallingford move. Are these corrected vouchers in respect to the same thing or is it something that contains only papers which originate with the government addressed to you?

Mr. Seering: Not corrected vouchers, Your Honor. We put in a claim for the full amount.

The Court: I am asking the witness.

Mr. Seering: Very well.

The Court: Let the witness inform the Court as to [195] the nature of this material that is contained in Plaintiff's Exhibit 6. I just want him to characterize it to reflect the nature of the exhibit.

The Witness: Your Honor——

The Court: Just a moment.

Ask the question, Mr. Seering.

Q. (By Mr. Seering): Will you explain to the Court, in answer to the Court's question, what that is?

The Court: I want you to give it a name which reflects the character of the exhibit.

(Testimony of L. H. Doolittle.)

Mr. Seering: I only know how to ask him what it is, Your Honor. I am sorry.

A. This, Your Honor, is our invoices to the government, made from the work sheets which were signed by government men, with the voucher which we made to the government for payment and a list of disallowances which we allowed on the total payment.

The Court: Proceed.

Mr. Seering: Do you have any objection to these?

Mr. Evans: I haven't any objection.

The Court: Plaintiff's Exhibit 6 is now admitted.

Mr. Evans: And 5 is also admitted?

The Court: It has already been admitted.

Mr. Seering: I offered 5. I now offer 6.

The Court: Both have been by the Court admitted. [196]

(The exhibits heretofore marked Plaintiff's Exhibits 5 and 6 for identification were then received in evidence.)

Q. (By Mr. Seering): Did you question the disallowance of the items to which you testified?

A. Yes, I did.

Q. And what happened on that?

A. Oh, I finally agreed to disallow those and they agreed to put it through for payment.

Q. And how long after that was it that your notice of termination of contract was received?

(Testimony of L. H. Doolittle.)

A. Very shortly. I cannot tell you the exact date.

Q. Now, in regard to the incident with the Immigration and Naturalization Service, the incident that was testified to, can you tell us whether you have checked your records and whether or not the bill that was rendered by you for $95 and something, as was shown here this morning, was or was not paid? A. It was paid.

Mr. Seering: You may cross-examine.

Cross-Examination

By Mr. Evans:

Q. Now, do I understand that you had no way of checking to see whether or not your own employees were on work or at [197] work at the proper time? A. We did.

Q. You had somebody there to check and see that they were there at the proper time?

A. That is correct.

Q. Well, then, how do you explain your previous statement to the effect that you had no way of knowing whether or not the men actually arrived on time?

A. No, I did not mean it that way, Mr. Evans. I said I had no way of making or forcing the men to arrive on time. When a man comes to work in the morning, we must pay him a full day's pay, and when my man, or a man who made up those work tickets and got those signed by the government, whatever is signed for on those work tickets,

(Testimony of L. H. Doolittle.)

that is the way they are billed, and I, personally, or no one else in the office would know if a man was 15 minutes late, an hour late or if he didn't show up at all if it was signed for upon those tickets.

Q. In other words, you were depending upon the government to keep your time books for you?

A. On that type of work it was up to the government because they were ordering our men and they were ordering the trucks. It was the government's discretion as to how many men we used. It was the government's discretion as to how many trucks we used. They could work one [198] truck or 10 trucks, one man or 50 men.

Q. You mean they called up every day and said we want 25 men here, 10 men there and some trucks there? A. That is right.

Q. Every day during this whole move?

A. Every day.

Q. Who would call you and give you that information?

A. Lloyd—Lloyd—I don't know what the man's last name was. Lloyd was his first name.

Q. Do I understand that you had no way of knowing in your office whether or not a man showed up for work other than by the records that the government furnished you?

A. Not until my man reported back from the job at nine or ten o'clock in the morning.

Q. And even if a man hadn't shown up all day,

(Testimony of L. H. Doolittle.)

you would still bill the government for it, wouldn't you? A. No, sir.

Q. Well, you did on your bills here, didn't you?

A. No, we did not.

Q. There were many instances in which trucks were late and men were late on which disallowances were made?

A. You have got them there.

Q. You permitted all these disallowances?

A. Yes.

Q. Isn't it a fact that you permitted them because you, in [199] your organization, had absolutely no way of knowing whether or not a man showed up on time or——

A. No, you are wrong there. We send a man out. He makes out a bill of lading which is an exhibit here.

Q. What exhibit is a bill of lading?

A. The next to the last exhibit. And he brings that signed bill of lading back. It is A-5—Exhibit No. 5. He brings this signed bill of lading back to our office. From the signed bill of lading we then make out our invoice and invoice the people concerned.

Q. But you, yourself, nor any official of your company, knew whether any of that had ever been performed except by the——

A. The signed bill of lading.

Q. ——signed bill of lading. Now, do I understand from your testimony that your company per-

(Testimony of L. H. Doolittle.)

formed all of this contract faithfully and fully complied with all the terms?

A. That is correct.

Q. There were no discrepancies at all?

A. We did it to the best of our ability, yes.

Q. I am not asking about your ability. It is obvious from Mr. Hallam's testimony that you didn't have the men or materials to perform it. But is it your testimony that you did perform this contract fully with no discrepancies?

A. Yes, it is. [200]

Q. It is your testimony that you had the equipment and the men to perform this contract?

A. We had enough equipment and we had enough personnel to do the work.

Q. Well, how do you account for the fact that you didn't send the helpers along, then, when Mr. Steele ordered the trucks?

A. Well, to be truthful, I don't recall the incident.

Q. How does it come that you weren't able to get the trucks over to Mr. Smith's place for the move at 8:30 in the morning instead of 2:30 in the afternoon if you had enough men and equipment to perform the job?

A. On that particular instance we were trying to get some cardboard boxes to put their material in for them and I finally talked to the man down there and he told me personally to send a truck down and they could move the desks and we could

(Testimony of L. H. Doolittle.)

get the boxes in the morning and move the rest of it.

Q. Isn't it a fact that the trucks were called for at 8:30 in the morning?

A. That is right. I don't know. It could be, yes.

Q. And they didn't show up until 2:30?

A. I don't know when the trucks showed up.

Q. You don't deny that Mr. Smith is correct in his statement? [201] A. No.

Q. How do you account for that delay if you had the men and materials to perform this contract?

A. On this particular instance we were not required by the contract to furnish boxes.

Q. I am talking about having the trucks there on time.

A. We could have had the truck there on time.

Q. Why didn't you?

A. They wanted boxes with the truck.

Q. So you didn't send the trucks at all until 2:30? A. No.

Q. Have you got the document which I asked you to bring yesterday?

A. No, I do not. They will bring it up when they find it from my office.

Mr. Evans: I have no further questions.

The Court: Step down.

(Witness excused.)

Mr. Seering: Mr. Doolittle may be excused?

Mr. Evans: I have no objection.

The Court: You may be excused, Mr. Doolittle——

The Witness: Thank you, Your Honor.

The Court: ——as requested by Mr. Seering.

The Court: Call the defendant's next witness.

Mr. Evans: My next witness will probably be on the stand for half an hour or so, Your Honor. Shall I put him on right now?

The Court: Yes.

Mr. Evans: Will you take the stand, Mr. Street?

CHARLES E. STREET

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name? And spell your last name for the reporter, please.

A. Charles E. Street, S-t-r-e-e-t.

Q. Where are you employed, Mr. Street?

A. I am employed by the Bureau of Federal Supply, which was the Procurement Division of the Treasury Department.

Q. And how long have you been employed?

A. Since July of 1944.

Q. Now, in what capacity are you presently employed?

(Testimony of Charles E. Street.)

A. At present I am in charge of the Stores Division, which is one of the operating divisions.

Q. Now, I will ask you, what was your position during 1945?

A. At that time I was in charge of the Purchase and Supply Division which included purchasing as well as storage. [203]

Q. I will ask you whether or not in that capacity you were charged with any functions in regard to this contract with the Foster Transfer Company? A. I was.

Q. And what was the nature of your duty in that regard?

A. Being in charge of the Purchase and Storage Division, one of our functions was the preparation of many types of contracts, term contracts such as the drayage contract here under discussion, and the other side of the activity was in the storage and issue of materials and we naturally came in contact with all the agencies in this area and in the four northwest states and Alaska and were called upon to perform services for these agencies either in the issue of our supplies or in the making of contracts such as the one under discussion.

Q. Now, I will ask you whether or not you are familiar with the procedure which was followed or had any part in the procedure being followed in the invitation of bids when this contract was eventually awarded to the Foster Transfer Company?

(Testimony of Charles E. Street.)

A. I did.

Q. I will ask you whether or not the Foster Transfer Company bid was the lowest bid as far as dollars and cents was concerned? A. It was.

Q. I will ask you whether or not at that time there was any question in your mind or in the minds of your superiors as to whether or not the Foster Transfer Company had sufficient men and materials to perform this contract?

A. At the time the bids were opened we had an honest doubt in our mind.

Q. What, if any, action did you take to determine whether any—whether Foster Transfer Company was qualified and capable of carrying out the terms of this contract.

A. Mr. Clark, my assistant, and myself, visited Mr. Doolittle—both of the Doolittles, as I recall, at their place of business on Pine Street, at which time we discussed the equipment that they owned or operated, their personnel and their facilities for packing and crating, and went into details with them as to their facilities for doing the job and as to their previous experience. We also did some checking with some of the other agencies who had used them under a different arrangement.

Q. I will ask you whether or not at this conference that you had with the Doolittles any information was given to you as to the automotive equipment which the Foster Transfer Company had available to carry out this contract?

(Testimony of Charles E. Street.)

A. Yes. During that discussion, Mr. Doolittle gave us a list of equipment represented as being the equipment of the Doolittle Trucking Company, but explained that the operation [205] was a flexible one where the equipment would be switched first from one to the other and that it would always be available under the Foster Transfer contract in case it was needed.

Q. Now, do you have that list with you?

A. Yes, I do.

Q. Will you produce it, please?

A. Am I to remove it from the file?

Q. Yes. Just take it out of the file.

(Witness complies.)

Mr. Evans: Mark this for identification.

(List of equipment of L. H. Doolittle Trucking Company marked Defendant's Exhibit A-10 for identification.)

Q. (By Mr. Evans): You have been handed what has been marked for identification Defendant Exhibit A-10. Will you state whether or not that is the list which was given to you by the Doolittles as to the equipment—automotive equipment they had available? A. It is.

Mr. Evans: I will offer Exhibit A-10.

Mr. Seering: No objection.

The Court: It will be admitted.

(The list heretofore marked Defendant's Exhibit No. A-10 for identification was received in evidence.) [206]

(Testimony of Charles E. Street.)

Q. (By Mr. Evans): Now, I will ask you whether or not during that conference any information was given you as to the number of personnel which they had available to perform this contract?

A. That matter was discussed and we were told the number of personnel they had available.

Q. Did you make any notes on that information? A. I did.

Q. At that time? A. At that time.

Q. Do you have those notes with you?

A. Yes, sir.

Q. Will you refer to them and tell us what was told you as to the number of personnel they had available?

A. We were told that they had 20 drivers and 40 swampers.

Q. What is a swamper?

A. A swamper is a helper or a laborer that accompanies the truck drivers, or general laborer I would call a swamper.

The Court: How many swampers?

The Witness: 40.

The Court: And in addition to that?

The Witness: And in addition to that we were told that there was a job under way, a salvage operation at the Port on which they were using a considerable number of men, laborers and other types of men, we understood, [207] which would provide a pool of labor in case these people were

(Testimony of Charles E. Street.)

not sufficient to handle the work at any peak period or when there might be a number of agencies demanding service at the same time.

Q. I will ask you whether or not that information was used by you and your superiors in determining whether or not the Foster Transfer Company should be awarded this contract?

A. It was.

Q. Now, I will ask you whether or not there is any policy with your department with regard to giving small business men opportunities to have contracts with the government?

A. As a published policy, I can't say that there is. However, it has been a general policy that the small operator will be given a chance wherever it is possible to do so without doing anything that would be illegal or otherwise to the disadvantage of the government.

Q. I will ask you whether or not the carrying out of that policy had any influence upon the decision of you and your superiors to award this contract to Foster Transfer Company?

A. I think it did, in conjunction with the fact that these people were sincere and seemed like they were interested in doing a good job. And we believed at that time they would try and do a good job. With that policy and with [208] the statement of equipment, and in the desire to be fair to a small operator, that constituted, I am sure, our grounds for making the award.

(Testimony of Charles E. Street.)

Q. Now, upon making the award of the contract, I will ask you what if any action was taken by your office to notify other governmental agencies of the fact that the contract had been made?

A. Three days after the effective date of the contract, which would have been July 3rd—and that amount of delay was required because our reproduction work is not done in our office but is done in another office—we distributed to 85 agencies in the metropolitan area of Seattle copies of this contract, and later, if we missed any, we distributed some five or ten additional copies.

Q. Now, do you recall Mr. Hallam's statement that so far as he knew the government had taken no steps to notify the governmental agencies of this contract? A. I do.

Q. As I understand—will you state whether or not you, of your own knowledge, know whether at least 85 were notified on the first publication?

A. The record indicates that 85 were notified.

Q. And some others were notified later?

A. Yes, sir.

Q. Now, I will ask you whether or not during the course of this [209] contract, prior to the move of your warehouses, you received any complaints as to the performance of service by Foster Transfer? A. I did.

Mr. Seering: To what time does he refer?

Mr. Evans: From the beginning of the contract up to approximately the 15th of December.

(Testimony of Charles E. Street.)

Q. I will ask you whether or not those complaints were called to the attention of the officials and employees of the Foster Transfer Company?

A. They were.

Q. I will ask you if you can recall approximately how many complaints were actually received?

A. Well, at this time it is somewhat difficult to remember. Some of them were verbal complaints, but I would say approximately eight or nine.

Q. I will ask you whether or not conferences were ever held with the Foster Transfer Company in regard to those contracts?

A. Yes, sir; there were.

Q. I will ask you whether or not Mr. Doolittle ever attended any of those conferences?

A. Mr. Doolittle did.

Q. I will ask you whether or not you were present at any of those he attended? [210]

A. I was.

Q. Do you recall which ones they were?

A. I recall specifically a conference in August, the result of which was a confirmation letter which has already been introduced as a letter.

Q. That is Mr. Smith's letter?

A. No, I believe that is our letter.

Q. Oh, your letter.

A. Of August 26, or something like that.

Q. And can you recall what took place at that conference? A. Rather distinctly.

Q. Will you just tell the Court what took place at that conference?

(Testimony of Charles E. Street.)

A. Well, at that time we had already had a number of complaints about the new contract. I would say that the complaints were in two or three categories, failure of equipment to be on time, failure to furnish the equipment as ordered, that is, either smaller equipment or larger than was ordered, which sometimes could not be used because of the facilities available to use the equipment, and there were some cases of where work had been ordered which the agency thought could have been done during the regular hours with advance notice given where it was actually done later and overtime charges applied. And I don't remember all of the details of where the work fell [211] down, but generally it was with equipment and personnel.

Q. I will ask you whether or not those complaints were called to the attention of Mr. Doolittle?

A. They were.

The Court: At this point we will take our noon recess until 2:00 o'clock. You may step down.

> (Whereupon, at 12:00 o'clock noon, Wednesday, August 3, 1949, the above-entitled matter and proceedings was recessed until 2:00 o'clock p.m., same date.) [212]

August 3, 1949, 2:00 o'clock p.m.

(All parties present as before.)

The Court: Are there any ex parte matters or matters upon agreement? If not, you may resume the trial.

(Testimony of Charles E. Street.)

Mr. Evans: Will you take the stand, Mr. Street?

CHARLES E. STREET

the witness on the stand at the taking of the noon recess, thereupon resumed the stand and testified further on direct examination as follows:

By Mr. Evans:

Q. I believe we were discussing the letter signed by you on August 28, 1945, and the conference which you had with Mr. Doolittle on that date. Now, I will ask you whether or not that letter comprises generally the results of that conference?

A. It did.

Mr. Evans (Addressing the bailiff): I believe that the original letter is in evidence as Exhibit Number A-4. Please hand that to the witness.

The Court: That is the letter of August 28, 1945.

Mr. Evans: Now, that letter has not been read to the Court yet. I would like to have this witness read it. [213]

The Court: Well, you may do that if you desire.

Mr. Seering: Both of those letters have been read.

Mr. Evans: I don't believe either one of them—

The Court: Well, this witness may read it.

A. This is a letter dated August 28th, 1945, to the Foster Transfer Company——

The Court (Interposing): This statement applies to the future and not to the present. I think

(Testimony of Charles E. Street.)
time can be saved by counsel reading written documents rather than leaving it to the witness.

You may proceed, though.

A. (Continuing): The letter is dated August 28, 1945, addressed to the Foster Transfer Company, attention Mr. H. L. Doolittle.

"Gentlemen:

"Reference is made to our conference this morning relative to service under Contract No. T11rp-156. As a matter of record, I should like to restate the substance of our discussion and the suggestions and recommendations which were made for improvement in the service under the subject contract.

"In order to eliminate the possibility of undertaking hauling jobs with insufficient accessorial equipment, a procedure should be developed so that on services ordered over the telephone all necessary information can [214] be obtained at one time and plans made for prompt and efficient accomplishment of the work requested by the ordering agency.

"In order to eliminate delays and unsatisfactory service, additional equipment should be made available, particularly in the smaller capacity units such as ½ ton, ¾ ton and 1-ton trucks. When ordering agencies describe the job to be performed, a truck of the minimum size required should be utilized, and in those instances where you are unable to furnish a minimum size truck and by your own choice furnish a heavier vehicle, every precaution should be taken to insure billing at the minimum vehicle rate.

(Testimony of Charles E. Street.)

"Your employees should be strictly trained and disciplined in the importance of rendering service in absolute compliance with the ordering agencies' wishes. You are a service agency and, as such, should observe the customers' wishes with respect to the manner in which jobs are performed when a customer expresses his preference. In those instances where the ordering agency indicates no preference in handling, then, of course, you should do the job in the customary and most efficient way. It cannot be emphasized too strongly that when an ordering agency specifies the manner in which a job is to be performed, it should be performed in that manner even though to do [215] so may result in slightly greater cost than otherwise. This cost is frequently offset by advantages to the ordering agency in having the work performed in accordance with their specifications.

"Along this line, it might pay dividends to discuss this at more or less regular intervals with your truck drivers so that 'customer satisfaction' is always the objective in performing jobs under the contract.

"It is sincerely hoped that the standard of performance under this contract will be improved as a result of our discussion, and such corrective measures as you believe necessary will be applied. If complaints continue and are found to be justified, we should otherwise be forced to seek relief in

(Testimony of Charles E. Street.)

accordance with the terms of the contract. We hope this will not be necessary.

"Very truly yours," signed by myself.

Q. Now, were you present at the discussion on September 26? A. I was not.

Q. You were not present. Now, in regard to this movement of your warehouses, I will ask you whether or not you received—whether or not initially bids were invited from other companies to perform this move? A. They were.

Q. And I will ask you whether or not bids were received? A. Bids were received. [216]

Q. I will ask you if you have those bids with you? A. I do have.

Q. Can you produce them, please?

A. (Witness complies.)

Q. Is that all?

A. To the best of my knowledge, this includes all of the papers relative to that particular job.

Q. May I see them? (Material in question presented to Mr. Evans.) Do you have the bid of the lowest bidder in here?

A. So far as I know, it is.

Q. Do you recall the name of the company which presented the lowest bid?

A. I am not sure. It was either Martin Transfer or Ballard Transfer. I don't recall which it was offhand.

Q. Well, are these three bids here all the bids that were received?

(Testimony of Charles E. Street.)

A. If that is all that there are in the file, that should represent them.

Mr. Evans: Mark this for identification, please.

(Bids marked Defendant's Exhibit A-11 for identification.)

Q. (By Mr. Evans): You have been handed what has been marked for identification as Defendant's Exhibit A-11. Will you state whether or not those are the bids which were received in response to your invitation for the [217] warehouse move?

A. To the best of my knowledge, they are.

Mr. Evans: We will offer Defendant's Exhibit A-11.

Mr. Seering: I have no objection.

The Court: Admitted.

(The documents heretofore marked Defendant's Exhibit A-11 were then received in evidence.)

Q. (By Mr. Evans): Now, will you turn to the lowest bid there and state what was the lowest bid submitted?

A. The lowest bid was that of the Martin Transfer Company.

Q. What was the amount they bid to do the job?

A. The total amount of the bid for the move, involving that portion at Wallingford and that portion at 2028, combined, was 4500 exactly.

Q. And I will ask you whether or not that bid

(Testimony of Charles E. Street.)
states as to the length of time that would be required to make the move? A. It does.

Q. And what was the length of time?

A. Seven days from the Wallingford location and five from the 8th Avenue location.

Q. That would make a total of how many days?

A. Twelve.

Q. Twelve working days. [218]

The Court: Who submitted that lowest bid?

The Witness: The Martin Transfer.

The Court: M-a-r-t-i-n?

The Witness: Yes, sir.

Q. That information which you have just given us is in that Exhibit A-11? A. It is; yes, sir.

Mr. Evans (Addressing the bailiff): May I see Plaintiff's Exhibit 4?

(Exhibit in question presented to Mr. Evans.)

Q. (By Mr. Evans): I will ask you whether or not Foster Transfer Company made representation to you that they felt that that contract should be awarded to them under their existing contract rather than to let a new contract?

A. Representations were made to the office through Mr. Seering—through the attorney.

Q. Now, I will ask you whether or not the Foster Transfer Company was asked to inspect the job and determine whether or not they could perform the job within the time that the lowest bidder states that he could do it? A. They were.

(Testimony of Charles E. Street.)

Q. Now, at this time I would like to read a letter of December 14th which is in evidence, Your Honor.

The Court: You may do so. [219]

Mr. Evans: This is a letter from the Treasury Department, Procurement Division, dated December 14, 1945, addressed to Foster Transfer Company, 13th and East Pine Streets, Seattle, Washington.

"Gentlemen: Reference is made to our several telephone conversations regarding the moving of government-owned equipment and supplies from the warehouse at 3402 Wallingford Avenue to the warehouse at 1518 First Avenue South, described in detail as Item 1 of our Bid Invitation T11rp-46-104, copy of which is attached.

"This office has devoted some thought to the possibility of handling this move under Contract T11rp-156, although that contract was executed for general useage in handling varying quantities of government-owned supplies, the nature and frequency of which could not be predetermined. It was not contemplated that movements requiring the furnishing of special facilities such as lift jacks, flats, loading tractors and similar equipment would fall within the contract; such moves being susceptible of detailed specifications to be covered by special invitations to bid, such as our T11rp-46-104. Nonetheless, the U.S. Treasury Department is considering your offer to handle the move under Contract T11rp-156, provided the government's interests are definitely protected by assurance that the inventory

(Testimony of Charles E. Street.)

(approximately $250,000) can be moved within a stipulated period, 7 working days from date of starting, [220] at a reasonable cost.

"To this end, and upon our invitation, you have examined the stock at 3402 Wallingford, discussed the specifications applying to the move, which are stated in full detail in T11rp-46-104, and you have stated verbally that you could move the material as described in Item 1 in the bid invitation within a period of 7 working days, using 3 semi-trailers and not to exceed 16 laborers which, under Contract T11rp-156 would involve an expenditure of approximately $2200.

"Because of the value of the inventory, and the fact that the material must be moved within a stipulated period, notwithstanding your willingness to perform under a general application of contract T11rp-156, the Treasury Department will authorize such performance only upon specific assurance from you, in writing, that you can handle the movement within the provisions contained in this letter in Bid Invitation T11rp-64-104, wherein such invitation makes reference to Item 1. Your decision should, of course, be made with full regard for your contractual responsibility to furnish prompt and satisfactory service under T11rp-156 to other Government Agencies simultaneously with this undertaking.

"You are requested to promptly advise this office, in writing, whether you will guarantee satisfactory

(Testimony of Charles E. Street.)
performance [221] under the above stated conditions.

"Very truly yours, signed G. K. Clark, Chief Contract and Purchase Section."

I would like to read the reply to that letter which is in evidence as a part of this exhibit.

The Court: You may do that.

Mr. Evans: It is a letter dated December 15, 1945, addressed to the Treasury Department, Procurement Division, 2028 8th Avenue, Seattle 1, Washington, attention: D. K. Clark, Chief Contract and Purchase Section.

"Gentlemen: We have your letter of December 14th, 1945, reference is made to the letter of December 12th, 1945, written to you by our attorney Mr. Harold A. Seéring.

"It is still our position that the work embraced within T11rp-46-104 is covered by our existing contract T11rp-156.

"We again tender performance of this work in a workmanlike manner under the terms of that contract. It is our estimate that the work should require approximately seven days.

"Very truly yours, Foster Transfer Co., Inc., by: L. H. Doolittle, Manager."

Q. (By Mr. Evans): Now, Mr. Street, I will ask you whether or not there wasn't another letter dated December 18th [222] received by you from the Foster Transfer Company? A. Yes, sir.

Q. Do you have the original of that letter there?

A. I do have the original of the letter.

(Testimony of Charles E. Street.)

Q. Will you let the bailiff have it, please, and have it marked for identification.

(Letter dated December 18, 1945, from Foster Transfer Company to Treasury Department, Procurement Division, attention G. K. Clark, marked Defendant's Exhibit A-12 for identification.)

The Witness: Mr. Evans, may I correct a statement that I made a couple or three questions back? I find that I was in error on the time here. I was looking at a paper that should not be considered—should not have been considered when I made the answer.

Q. Will you state what correction you intend to make?

A. I stated that the low bidder, Martin Transfer Company, provided for seven and five days respectively for the Wallingford and the 8th Avenue lot. That is incorrect. The proper time was nine and seven rather than seven and five.

Q. Making a total of 16 days?

A. Making a total of 16 days. That is according to the record. I misstated that.

Q. You have been handed what has been marked for identification [223] as Defendant's Exhibit A-12. I will ask you whether or not that is a letter received by your office from the Foster Transfer Company, dated December 18, 1945? A. It is.

Mr. Evans: Do you have any objections to it?

Mr. Seering: No objection.

(Testimony of Charles E. Street.)

Mr. Evans: I offer it at this time, and I would like to read it.

The Court: Admitted, and you may read it.

(The letter heretofore marked as Defendant's Exhibit No. A-12 for identification was received in evidence.)

Mr. Evans: It is a letter dated Seattle, Washington, December 18, 1945, addressed to Treasury Department, Procurement Division, 2028 8th Avenue, Seattle 1, Washington, attention G. K. Clark, Chief Contract and Purchase Section.

"Gentlemen: Referring to our letter December 15, 1945, and your letter of December 14th, 1945, relative to T11 rp-46-104 and our present contract T11 rp-156.

"We will endeavor to do this work in workmanlike manner and at the same time do the work expeditiously with the guarantee of keeping the expenditures as low as possible.

"Very truly yours, Foster Transfer Company, Inc., [224] by L. H. Doolittle, Manager."

Q. (By Mr. Evans): Now, Mr. Street, on the basis of the correspondence which I have just read, and your verbal conversations with the officials of the Foster Transfer Company, I will ask you whether that decision was made to permit the Foster Transfer Company to perform this warehouse move?

A. It was.

Q. I will ask you whether or not prior to the beginning of the move you received any instructions

(Testimony of Charles E. Street.)
from your superior, Mr. Ihlanfeldt, with regard to making any check as to the performance of this move? A. I did.

Q. Will you state what those instructions were that you received?

A. Mr. Ihlanfeldt, the Regional Manager, who had been informed of the complaints that we had received, orally as well as written, and who had been kept up to date on the operations under the contract, by ourselves and others, said that he would like to have us go ahead and use this contract and actually determine whether some of the complaints that we had received from others were justified. Many times people will complain about things and their complaints are not legitimate. We had had these complaints and we wanted to establish definitely, if we could, whether [225] they were legitimate, whether the contractor was in the right or whether the agencies were, because it not only affected us in our operations, in our dealings with the contractor, but other people likewise. So I was instructed that we should pay particular attention to the operation during the warehouse move.

Q. Now, I will ask you whether or not you did carry out those instructions?

A. I did, to the best of my ability.

Q. I will ask you whether you, yourself, made personal observations of the performance of this contract? A. I did.

Q. I will ask you whether or not you instructed the people who worked under you to do likewise?

(Testimony of Charles E. Street.)

A. I did that likewise.

Q. Now, can you state the number of working days it actually took to perform this contract by the Foster Transfer Company?

A. For the complete job it took 27 working days.

Q. And what was the cost which was ultimately paid by the government?

A. I will have to refer to the record to get the exact figure. Approximately $5400.

Mr. Evans: That, I believe, is already covered by an exhibit that is in. Isn't that covered by the [226] vouchers which were your 5 and 6?

Mr. Seering: That is right.

Q. Now, I will ask you whether or not during the course of your observations of this particular move you made any notes as to discrepancies which you observed? A. I did.

Q. I will ask you whether or not those notes have been transformed into disallowances as to the payment to Foster Transfer Company?

A. They were.

Q. I see.

Mr. Evans (Addressing the bailiff): Would you hand the witness, please, Plaintiff's Exhibits 5 and 6?

Q. I believe as a part of Exhibit 6 there are some disallowances made there. Can you refer to those and determine the cause and background of what occurred? A. Well,——

Q. Or are there some other documents you would prefer to refer to? A. It is included here.

(Testimony of Charles E. Street.)

Q. What is the first item on that list?

A. The first item is a $10 disallowance on December 21st under a certain particular number here because of a delay in unloading steel shelving and resulted in hold up and movement of other merchandise throughout the day. [227] Time for two semis for a period of one hour each on Ticket 05781 is disallowed, or a total of $10 on that transaction.

Q. Now, what was the occasion—first I will ask you: Were you present and did you see what was occurring that caused that disallowance?

A. I did. At the time I happened to be at the receiving end.

Q. And what, if anything, took place there?

A. Well, as I recall, after this length of time, a truck load of 10 steel shelves setup were received. These were shelving 7 feet high and approximately 3 feet wide and, as I recall, about 9 feet long. It was on a large semi-trailer. And we had wanted the shelving to be brought in set up so that it would not require additional time for dismantling and then later reassembly of the shelves so that we could put the stock that was being brought in into the shelves where it belonged as bin stock.

Q. What kind of stock?

A. Bin stock; in other words, broken packages where it is in the bin and stock selectors pull the items out of the bins. And we requested that this be set up and moved without being disassembled, and at the time this truck load came in Mr. Doolittle was

(Testimony of Charles E. Street.)
there, as was his truck driver and a [228] helper and eight men, I believe, who were working that end of it, and some two or three hours were involved in trying to figure out a method of getting those shelves off the truck. And during that time a couple of other trucks, or at least one—I am not sure whether there were two—I believe there were two—but there was at least one other truck that pulled up with merchandise on it, and there were no concrete suggestions that Mr. Doolittle was able to make. His men didn't know how to get the equipment off. And finally our warehouse superintendent, who was Mr. Sbinden, authorized dismantling of bins in order to get them up off the floor which would, of course, require disassembly and delay the operation.

That was the basis for part of this disallowance here.

Q. Now, Mr. Sbinden has been mentioned two or three times. Is he available now to testify?

A. Mr. Sbinden is deceased.

Q. Now, I will ask you whether or not from your observations of Mr. Doolittle's supervision of this unloading you were able to form any opinion as to his ability or experience in handling matters of that kind?

A. Well, the indications were that no one in the crew, or Mr. Doolittle, or his truck driver, or any of the other [229] people knew how to go about this job. They were at a loss, I would say, as to what to do, and I didn't hear Mr. Doolittle make any suggestions or try to tell his people what to do.

(Testimony of Charles E. Street.)

They tried a number of things. They tried to get it off, but nobody knew how.

Q. How much time was lost there?

A. Three hours, as I recall.

Q. Now, what is the next item on there?

A. The next item also refers to the date of December 21 and a certain ticket number and is a disallowance of $12. The statement is: "Because of extremely poor planning and lack of supervision it required eight men of the crew for a period of two and one-half hours to unload steel shelving that should have been unloaded in one hour and a half under proper management; therefore, eight hours are disallowed." It is a part of the same transaction.

Q. A part of the same transaction. Now, are there any other items on there of that same transaction?

A. No. I am sure that is all of that transaction.

Q. Now, what is the next transaction?

A. The next transaction refers to a two dollar and fifty cents disallowance because a truck reported at 9:00 a.m., and a half hour was disallowed; in other words, a half hour was allowed to get to the job, but the effective time [230] would have been, then, from 8:30 to 9:00 o'clock rather than from 8:00 o'clock until 9:00.

Q. Now, the bill submitted to you would have covered the truck being there at what time?

A. Presumably being on the job from 8:00 o'clock, or arriving at 8:30, allowing a half hour for intransit time.

(Testimony of Charles E. Street.)

Q. Now, the disallowance was based on an observation made by you?

A. I presume it was. Most of these observations were made by myself. Some of them were reported to me by Mr. Sbinden and others, but most of them were made by myself.

Q. Now, what about the next item?

A. The next item is a $1.50 disallowance which states that one man of a crew of 7 at Wallingford on December 22nd reported at 9:00 a.m. Therefore, one hour is disallowed.

Q. What is the next item?

A. The next item is a 75 cent disallowance representing a half hour's time for one man who reported to work at 8:30 rather than at 8:00 o'clock.

Q. All right. What is the next item?

A. The next item is a $5.00 disallowance. Two semis knocked off at 3:30 p.m. after completing delivery at 1518 1st Avenue. Time allowed to 4:00 p.m. One hour's time disallowed. [231]

Q. All right. What is the next item?

A. A dollar and a half disallowance at 1518 1st Avenue South. One man reported at 9:00 a.m. One hour regular time disallowed.

Q. What is the next item?

A. $2.50 disallowance at Wallingford. A semi did not arrive on job until 9:15 a.m. Half hour disallowed.

Q. What is the next item?

A. The next item is also a $2.50 disallowance at Wallingford. Semi pulled off job at 11:30 a.m.

(Testimony of Charles E. Street.)
Hamilton. That was a sub-contractor. One-half hour disallowed.

Q. All right. What is the next item?

A. $2.50 disallowance at Wallingford. Semi pulled off at 11:30 a.m. One half hour disallowed.

Q. All right. What is the next item?

A. A $4.15 item at 1518 1st Avenue South. Two men did not show up until 9:30 a.m., therefore, three hours regular time disallowed.

Q. All right. What is the next item?

A. $2.25. Two men reported for work at 8:45 a.m.

Q. What is the next item?

A. $10; Wallingford; left warehouse 1518 on this date at 1:10 p.m., immediately after driver. Cooper had unloaded and started for Wallingford. Cooper did not arrive at Wallingford until 3:45 p.m. Allowing 35 minutes for [232] normal trips, two hours time was disallowed. That was my own personal observation. I happened to be there on that date.

Q. All right. What is the next item?

A. The next item is a $10 disallowance; Wallingford; Hamilton truck reported 10:00 a.m., and driver out dissipating night before; made two loads and was unloaded at 2:30 p.m.; time allowed to 3:00 p.m.; two hours disallowed.

Q. All right. What is the next item?

A. $1.50 disallowance; Wallingford; two men reported 8:30 a.m.; one hour regular time disallowed.

Q. All right. What is the next item?

(Testimony of Charles E. Street.)

A. $3.00; only crew of four remained to unload trucks; two hours standard time disallowed.

Q. All right. What is the next item?

A. $1.88 disallowance at Wallingford; one man on at 8:30 a.m.; one man on at 8:40 a.m.; one and a quarter hours regular time disallowed.

Q. What is the next item?

A. $45.25. No record on this semi. Only four semis working on January 2nd. And it refers to the ticket number. Invoice disallowed.

Q. All right. What is the next item?

A. The next and final one is $42.50 disallowed. Only four semis on the job on January 3rd. [233]

Q. In regard to those last two items, do I understand you correctly, that they billed you for a semi on each day which never showed up?

A. Apparently more trucks were billed for than showed up,—according to the records.

Q. Now, I will ask you whether or not at the time this job was going on you were in contact with any of the officials of the Foster Transfer Company calling their attention to the unsatisfactory service which they were performing?

A. Mr. Hallam was on the job part of the time and I called it to his attention a number of times, that things were not moving properly and that we needed more men and a little better supervision of the men, and in some cases more equipment. That was almost a daily occurrence.

Q. And as a result of your complaints was there any improvement in the performance?

A. They tried to get men when more men were

(Testimony of Charles E. Street.)
indicated as being needed, but they were not always able to do so,—also equipment.

Q. Well, was there any improvement in the performance? A. No.

Q. I will ask you whether or not they had the men regularly on the payroll to perform this job, to your knowledge?

A. I couldn't state definitely, but I am rather sure they didn't from what I was told. [234]

Q. I will ask you whether or not you had any concern about the job taking more time than you had anticipated?

A. We had a great deal of concern about the job taking more time.

Q. In what regard would it cost your operations any concern by taking 27 days rather than 16 days?

A. Well, as has already been stated, while the move was going on we were completely shut down, and there are some 500 agencies in the four northwest states and Alaska who have jobs to do, whether it is fighting forest fires, building dams, or whatever it may be. Many of those agencies depend on us for some of their operating supplies, so during the duration of the move, if they were in need of articles and had orders in, of course we could not accommodate them. So in addition to the additional work of crawling out from under an extended backlog, we could have adversely affected operations of other agencies who had jobs to do and who may have been depending on supplies from us.

(Testimony of Charles E. Street.)

Q. How many agencies did you say depended on you for supplies?

A. Five hundred and six government offices in the four northwest states and Alaska who requisitioned supplies through our operation.

Q. I will ask you whether or not you had any concern about the cost which was mounting up?

A. We did. It was likewise a concern to us because of the [235] peculiar operation we have.

Q. In what regard?

A. Our operation differs from other government agencies in that it is largely a self-supporting operation. Merchandise is bought in large quantities, marked up and sold to other government agencies at a cost, or at a selling price which covers a nominal mark up for handling the goods. We do not operate from appropriative funds as do other government agencies. We have an operation very similar to a business where we must pay for the job from the business done. And if we were stopped completely for that length of time, it means that there was no buying being done; in other words, there was no revenue, because we must pay for our operation.

Q. Now, will you state whether or not you have had any dealings with other contracts of this nature?

A. I have.

Q. I will ask you whether or not you had any dealings with the contractor who had the contract prior to the time Foster had the contract?

(Testimony of Charles E. Street.)

A. The administration and supervision of the contract fell within my office. I had no dealings because there was no—nothing to be taken up.

Q. I will ask you whether or not during the contract prior to Foster's contract you had received any complaints such [236] as the ones you received by Foster Transfer? A. Never a one.

Q. I will ask you whether or not you received any complaints on the contractor who took over after Foster Transfer's contract was cancelled?

A. None.

Q. I will ask you whether or not if any complaints had been received on either of those contracts it would have come to your attention?

A. They would have until October of 1947, at which time our office was slightly reorganized and after that date I wouldn't know about it.

Q. What year?

A. About October of 1947.

Q. October, 1947? A. Yes, sir.

Q. How long prior to this contract with Foster Transfer Company were you in a position where you would have known about any complaints that were received?

A. Back to July of 1944, when I went to work for this bureau.

Q. Now, in regard to your experiences with other contractors on this same type of contract, have you ever had to have government men out supervising and checking their work? A. No, sir.

(Testimony of Charles E. Street.)

Q. I will ask you whether or not under this contract you [237] consider it necessary for the government to have a man on the job checking their work?

A. I believe the disallowance here, which is an exhibit, would indicate that it is necessary.

Q. As to all contractors?

A. No. I misunderstood your question, perhaps. Will you restate it, please?

Mr. Evans: Will you read the question, Mr. Reporter?

(The last question was repeated by the reporter.)

A. My answer is yes.

Q. That is on the Foster Transfer contract or contracts of this nature?

A. On this contract the question was.

Q. I will ask you whether or not at the time the contract was let any such—whether or not any such contract was let, you anticipate that it is going to be necessary for the services of a government man to be used in checking on the contractor?

A. We did not.

Q. Now, I will ask you whether or not you recall any forklift truck being procured for this particular move of your warehouse merchandise?

A. I do. [238]

Q. I will ask you who made the arrangements to make the truck available?

(Testimony of Charles E. Street.)

A. Our office arranged for the loan of the fork-lift truck.

Q. From whom?

A. Army Service Forces Depot.

Q. From another governmental agency?

A. From another governmental agency.

Q. And at whose instance was that arrangement made?

A. I understood from Mr. Hallam that Mr. Doolittle thought that the fork-lift truck would be suitable for the operation in order to expedite it. That is what I was told by Mr. Hallam.

Q. Did Mr. Hallam think it would be suitable?

A. He did not. He did not think it would work.

Q. I will ask you whether or not the fork-lift truck was procured? A. It was.

Q. And who went after it?

A. Mr. Hallam.

Q. And during the time that he was gone was there anybody supervising the work?

A. No, there was not.

Q. I will ask you how long it took him to go get the fork-lift truck? A. A half a day. [239]

Q. I will ask you whether or not after he got the fork-lift truck it operated?

A. It did not.

Q. I will ask you whether or not it was necessary to return the truck? A. It was.

Q. How long did that take?

A. A half day.

(Testimony of Charles E. Street.)

Q. And during the time in which he was taking the truck back was there anybody there to supervise the men who would otherwise have been under Mr. Hallam?

A. There was no supervision.

Q. Now, in Exhibit Number A-6, on page 55, there is a memorandum which purports to be prepared by you on February 19, 1946. Do you have a copy of that memorandum? A. I do.

Q. I will ask you, what was the purpose of your preparing that memorandum?

A. My purpose in preparing the memorandum was to set down for the record our experience with the contractor and experiences as reported by others.

Q. I will ask you whether or not that memorandum, dated February 19th, reflects the information which was available to you through your own personal observations and through reports received by you in your official capacity? [240]

A. It was.

Q. Will you turn to that report, please, either the one you have in your file or the one in the exhibit? Now, I will ask you whether or not at the time you made this report all the information set out in there was fresh in your mind?

A. It was.

Mr. Evans: May it please the Court, this particular part of Exhibit A-6 is already in evidence. At this time I believe it would save time if I read this report of February 19.

(Testimony of Charles E. Street.)

The Court: You may do that.

Mr. Evans: This is a memorandum dated February 19, 1946, addressed "To: The Record", from Charles E. Street, Acting Chief, Purchase & Supply Division. Subject: Contract T11rp-156—Foster Transfer Company.

"As a prelude to this administrative finding of facts relative to the drayage contract referred to above, it seems desirable for the record to indicate the peculiar position of Treasury-Procurement in this instance. This contract was entered into by Treasury-Procurement as a general service contract for the convenience and economy of all Federal Agencies in the Seattle Metropolitan Area.

"Since the inception of the above contract on July 1, 1945, many Federal Agencies in the Seattle Metropolitan [241] Area have from time to time reported by telephone upon the unsatisfactory work, the inadequacy of equipment, lack of experienced personnel—adequate personnel, or any personnel at all, and upon other conditions in general which, in the opinion of the various Federal Agencies, have constituted inability to perform a job satisfactorily under the contract. Although these agencies have reported these unsatisfactory conditions by telephone, very few have felt inclined to present written data for the record, although some have done so, as for example, the Office of Surplus Property and the Fish and Wildlife Service, whose letters are self-explanatory and now in the files.

(Testimony of Charles E. Street.)

"Some of the other agencies who have made verbal or telephonic complaints, together with the subject matter of such complaints, are as follows:

"Fisher Market News. This agency was in the process of transferring an employee to a new station in Chicago. The employee was to take a part of his belongings with him and have the remaining part held in storage until arrangement could be made at his new post to receive his goods. On the day of his departure, the pickup was made so late that the employee barely had time to catch his transportation, although adequate advance notice had been given to the contractor that the job was desired. In removing employee's goods from a second floor, some [242] damage was done to the landlord's staircase, which the contractor agreed to have repaired at his expense (the contractor's expense). Inasmuch as the weather was wet and rainy, the employee was greatly concerned that his goods would be damaged while in transit to the depot or storage warehouse, since the contractor had called for the goods with an open flat-bed truck and inadequate padding, notwithstanding the weather and the fact that a van had been ordered. Although the contractor apparently made good the damages which his employees had done to the premises being vacated and although a later inspection of the goods which were moved by means of a flat-bed truck in wet weather showed no actual damage or loss, the fact remains, as will be shown many times in suc-

(Testimony of Charles E. Street.)

ceeding paragraphs, that as a general rule personnel which can be hired by the contractor are of the poorest type, are inadequately instructed or supervised in the job to be done, and do not perform in a workmanlike efficient manner which can normally be expected of a well-established firm who contracts and proposes to render service to the Federal Establishments of a Metropolitan Area such as the City of Seattle, with several—perhaps one hundred Federal offices, plus large Military and Naval Installations with employees totaling several thousands. This incident also demonstrates the lack of equipment of a type suitable for [243] hauling and drayage of household goods, notwithstanding definite provisions of the contract requiring this type of work and statements made by the contractor at the time the contract was awarded that adequate equipment was either owned or available to him on rental agreements at all times for any work which might develop as a result of the said contract.

"U. S. Employment Service. This office reported to the writer that the Foster Transfer Company had removed two tables from one building to another location within a radius of a few blocks (four to eight blocks), and that this job had cost in the neighborhood of $14.00, which was considered to be excessive, as it represented approximately three hours work, when in the opinion of this officer, who had much previous experience with contractors, the job should have been done in less than half the time.

(Testimony of Charles E. Street.)

Upon further questioning, this officer reported that the men sent to do the job did not apparently know how to perform the work, as a result of which much time was spent in a 'trial and error' approach to the task. Here again the lack of adequate supervision or any instructions is conspicuous by its absence reflected in the way the job was done and the resultant excessive costs, which all lends credence to the 'fly by night' character of operations conducted by this contractor. [244]

"Alaska Communications System. This office reported they had placed an order with the Foster Transfer Company to furnish adequate men and a closed van to transfer certain expensive, technical radio and laboratory apparatus from one location to another, and that after having the service postponed for two days, the contractor finally showed up with a flat-bed truck in inclement weather to perform this job involving delicate equipment worth several hundred dollars. The crew sent to do the job were manhandling this equipment in stevedore fashion and with any other alternative the Alaska Communications System would have dismissed the truck and helpers and performed the job otherwise. Under the circumstances, however, they assigned two of their own officers to supervise the job, which required the better part of a day. In this instance resentment was felt by the using agency, based upon the assumption that they were entitled to the services of a competent firm who had qualified for a

(Testimony of Charles E. Street.)
contract with the Federal Government involving the expenditure of several thousand dollars annually by the various agencies. This is a proper assumption and a condition which must be created if it does not in fact exist with the present contract. Improper planning or a lack of management on the part of the contractor, inadequacy of his equipment and poor personnel are evident in each one of these transactions [245] and has been evident since the date of award, which is confirmed by the necessity of a conference meeting between representatives of this office and the contractor on August 28, 1945, as confirmed by letter of the same date in the file, as well as a similar letter of September 26, 1945, in which it was again found necessary to call attention of contractor to his failure to meet satisfactory service standards contemplated by the contract in question.

"In the operation of the Treasury-Procurement's Regional Warehouse and Supply Center at Seattle, this office itself has been one of the most frequent users of the contract here under discussion in making large shipments from our warehouse to the various using agencies as well as from freight sidings and cars into our own warehouse. Rarely, if ever, has the contractor furnished equipment at the time it was promised, or in the size which was ordered. On many occasions it has been necessary to utilize a much larger truck than was ordered (at the rate the truck ordered would have cost) which in many

(Testimony of Charles E. Street.)
instances has complicated loading and unloading because of limited facilities. The end result has been delays and confusion with the Government frequently paying more in the long run because of these condition. Conversely, smaller trucks have been furnished when larger ones would [246] have permitted more expeditious handling of the Government's business. Here again labor crews and drivers have been usually of the poorest quality, apparently without drayage experience in most cases, with the result that many jobs cost more to perform than they would have under a well-managed operation. In some instances crews, or parts of crews, have quit in the middle of a job because they weren't accustomed to the type of work or because they were a poor caliber of men. In some instances it has been necessary to disallow or reduce amounts which the contractor intended billing because of the fact that the job was dragged out through lack of planning, poor equipment and the labor used.

"Not only does an inferior operation such as this contractor has conducted contribute to or require unnecessary expenditure of Federal funds in the performance of hauling and drayage contemplated by the contract, but it has hampered the expeditious receipt into our warehouse of urgently needed supplies required for distribution to other agencies, where the delay in receipt and resultant loss of time and confusion was more costly than the original drayage outlay.

"In December, 1945, it became necessary to move

(Testimony of Charles E. Street.)
the Regional Warehouse and Supply Center from its location at that time at 3402 Wallingford Avenue and supplemental [247] stocks at 2028 Eighth Avenue to more spacious quarters at 1518 First Avenue South. Having in mind the contractor's demonstrated lack of knowledge of transport, the poor equipment and the paucity thereof available to him, as well as recollection of the type of labor he had been able to muster on previous occasions, a separate contract for this special job was deemed desireable, not only from a standpoint of cost but from a standpoint of expeditious completion, in order that the warehouse might be in a position to honor requisitions, issue merchandise and make deliveries to the various customers—various customer agencies in the region in the shortest possible time. Since this was a highly complicated move involving the loading, transportation, unloading and floor-stacking of approximately 1200 items by numerical sequence, the management, planning and supervision of this job for its orderly accomplishment without loss of identify of stock was by no means a minor concern, but a quality which up to that time had been found to be generally lacking in our experience with the contractor, as well as in those instances reported by other agencies referred to above. Bids were therefore solicited on a job basis looking to the accomplishment of the warehouse move, with whatever management, equipment and personnel a contractor considered necessary to do the job under *under* certain specified conditions"—— [248]

(Testimony of Charles E. Street.)

The Court: Now, just a moment, Mr. Evans. Will you skip the rest of the document about that incident? We have heard about that incident and I haven't learned any more in the last thousand words than I knew about it in the first hundred. Please skip further reference to that warehouse move.

Mr. Evans: Well, I can perhaps shorten this considerably.

The Court: I wish you would because it all seems so very repetitious to the Court. It seems to me like we are not developing any new information.

Mr. Evans: I would like to submit it. It is in evidence, Your Honor, and the reason I am going into it at this time is because that is, as I understand, from the file of the Treasury and a factual finding upon which he based his decision——

The Court: State the results of his finding. State the result of his finding or action. That is the main thing. You may do that in your own words based on this instance, that instance or another instance without reading long paragraphs—especially if it is already in evidence.

Mr. Evans: Very briefly it is report of factual finding of the unsatisfactory performance which was made to the file for the purpose of a permanent record, and [249] that is in evidence and was available to the Secretary of the Treasury at the time he made this decision confirming Mr. Ihlanfeldt's action.

I believe it has been called to the Court's atten-

(Testimony of Charles E. Street.)

tion once before, but in that regard there is a provision in the contract that dispute of factual findings of fact should be submitted to the Secretary of the Treasury for his decision and his decision shall be final.

Now, these are the facts which were sent to the Secretary of the Treasury.

The Court: Unless there are new incidents not touched upon by any evidence, it would seem to me a waste of time to consume any more trial time in making additional corroborative—or repeating references to the same incidents that are complained of in the record.

Mr. Evans: I can probably shorten this considerably, Your Honor, if I can have a short recess at this time.

The Court: You may take a recess. 10 minutes.

(Whereupon, a 10-minute recess was taken.)

The Court: You may proceed.

Mr. Evans: You may cross-examine.

Mr. Seering: Your Honor, at this time with the agreement of counsel I ask the Court's indulgence. Mr. Arthur Haugan, an attorney from Renton, is here and [250] counsel has agreed that if the Court permits I may put him on for just a few brief questions which are in the nature of rebuttal. It is out of order.

The Court: You may do that. The witness on the stand may be withdrawn for that purpose.

(Witness temporarily excused.)

REBUTTAL EVIDENCE FOR PLAINTIFF
(Out of order.)

ARTHUR L. HAUGAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Seering:

Q. Will you state your name, please?

A. Arthur L. Haugan.

Q. And where do you reside?

A. Renton, Washington.

Q. And what is your occupation?

A. Attorney-at-law.

Q. Were you in the military service during the war? A. Yes, sir.

Q. In what capacity?—and where? [251]

A. I served at the Seattle Port of Embarkation for four and one-half years ending April 10th, 1946.

Q. And what was your capacity there?

A. Starting as an assistant to the procurement officer, whose title was that of Purchasing and Contracting Officer for the Port of Embarkation, and eventually Purchasing and Contracting Officer.

Q. What was your military rank?

A. Captain during the later stages.

Q. In the course of your duties did you have any contacts with the Foster Transfer Company?

A. Yes, sir.

(Testimony of Arthur L. Haugan.)

Q. Did they perform work for the Seattle Port of Embarkation?

A. They did. Is that the same as the Doolittle Construction Company, may I ask?

Q. The Doolittles are connected with Foster Transfer. They have other operations,—a construction company. I may clarify that. I understand that the Port also had relations with them in connection with a salvage operation, is that right?

A. That is right. We had, as I recall, two contracts—one for hauling and one for the operation of the salvage lumber yard.

Q. Do you recall whether your hauling cartage contract was with Foster Transfer Company? [252]

The Court: Will you state yes or no?

A. I couldn't positively say whether that was the name under which the contract was signed or not.

Q. Your dealings, were they with H. L. and L. H. Doolittle?

A. Yes, sir; with the senior Doolittle and the son.

Q. And what can you tell us as to the quality and the nature of the work which was performed for the Port?

A. Their services were entirely satisfactory on those contracts.

Q. Did you have any complaints at all?

A. None that I recall.

Q. Do you recall over what period of time their services continued there?

A. My recollection is that the contract was still

(Testimony of Arthur L. Haugan.)
in effect in April 1946, when I left the service, and that it had been in effect—that or a prior contract—for, oh, a year or possibly a year and a half. I don't remember the dates very well. It was some time ago.

Mr. Seering: You may cross-examine.

Cross-Examination

By Mr. Evans:

Q. Well, now, as I understand, you don't know whether you were dealing with the Foster Transfer Company or the Doolittle Trucking Company, is that correct? [253]

A. No, sir; that's correct.

Q. But you are certain that the contract under which you were operating with the people known as the Doolittles was in force for at least a year?

A. At least that. Now, there may have been a renewal of a contract. I think there was.

Q. Well, was that a contract made by the army?

A. Yes, sir.

Q. It was not a contract made by the Treasury Department, was it? A. No.

Q. Your own contract? A. That's right.

Mr. Evans: I move that this witness' testimony be stricken because it does not pertain to the contract in question here. It pertains to another firm doing business under another contract.

Mr. Seering: If I may ask another question——

The Court: You may inquire. The Court will reserve ruling.

(Testimony of Arthur L. Haugan.)

Redirect Examination

By Mr. Seering:

Q. Were you aware of the existence of a Treasury contract? A. Yes, sir. [254]

Q. And were the services of a transfer company used under that contract by the Port or any of its subordinate divisions?

A. I couldn't tell you that, sir. If it was, I would have no connection with it. I administered those contracts which my office wrote as purchasing and contracting officer. If any services were rendered under a Treasury contract, I would have no connection with it.

Q. What can you tell us about the services and the costs and the rates of Foster Transfer and the Doolittles as compared to other operators?

Mr. Evans: Well, now, just a moment. I think that question should not be asked. I am objecting to it. This witness stated he knew nothing about the Foster Transfer Company.

The Court: The objection is sustained, subject to your right to further examine into his familiarity with the subject matter.

Q. (By Mr. Seering): Can you give us any further information on that?

A. My recollection is that my dealings were chiefly with the senior Doolittle. My recollection is that he operated under two or three different names, all of which, as I understood at the time, was a family business under different names or incorporations.

(Testimony of Arthur L. Haugan.)

My recollection is [255] that—of these two contracts—one was with him under one style and the other one under the other style. Foster Transfer might have been the name of one of those contracts, but my recollection is uncertain on that.

Mr. Seering: Mark these.

(Letter from Seattle Port of Embarkation to Foster Transfer Company dated February 28, 1946, marked plaintiff's Exhibit No. 7 for identification.)

(War Department Form No. 19 from Seattle Port of Embarkation to Foster Transfer Company re Contract No. TLIRP-45-TLIRP-156 marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Seering): Mr. Haugan, you are being handed Exhibit 7 for identification and Exhibit 8 for identification solely for the purpose of refreshing your recollection as to whether your dealings at the Port were with Foster Transfer Company or not. Referring to those, can you tell me what the fact is in that regard?

A. Referring to what is marked Plaintiff's Exhibit 7, that is Change Order "A".

The Court: The last word spoken I didn't understand.

The Witness: Change Order "A".

The Court: What does that mean?

The Witness: Changing the terms of a contract which is identified as TLIRP——

(Testimony of Arthur L. Haugan.)

The Court: It is an amendment to a previously existing contract? Is that or is that not the fact?

The Witness: That is the fact. And that would not be a contract which I negotiated because we had a different symbol on our contracts. The symbol TLIRP refers to some other government agency.

The Court: You may pass on to the next. Ask him another question.

Q. (By Mr. Seering): What about Plaintiff's Exhibit 8?

A. That is a delivery order, No. 113, calling for certain items of services, a contract which is—which likewise bears the symbol TLIRP-45, and again that would not be under our contract.

Q. If it is agreed that the number TLIRP-156 refers to the Treasury Contract, would you say that those are otherwise authentic documents under that contract with the Port?

A. Yes, sir; they have every appearance of being the type of documents we used.

I might explain, if you wish, that the transportation office at the Port of Embarkation ordered hauling services under our contract if they chose, or under any other contract which was available to the government, and had their own contracting officer who would issue documents such as this delivery order, Exhibit 8. [257]

The Court: Well, we are backing up about a detail here that makes the Court wonder if the importance of it justifies the amount of time. Pro-

(Testimony of Arthur L. Haugan.)

ceed and develop the witness' testimony or withdraw him from the stand.

Q. (By Mr. Seering): On the basis of those documents, and what you just said, can you now tell us whether your dealings were with Foster Transfer Company?

A. The name strikes a note of familiarity in my mind. Before I would want to say categorically yes or no, I would like to refer to our own contract.

The Court: Of course, this ought to have been done before this moment.

Proceed, counsel.

Mr. Seering: I have no further questions.

The Court: Any cross-examination?

Mr. Evans: I again move that this witness' testimony be stricken. He is talking about another contract,—another party.

The Court: The motion is denied. The Court will have in mind the question of weight to be attached to the testimony.

Mr. Evans: I have no further questions.

The Court: Step down.

(Witness excused.) [258]

END OF REBUTTAL TESTIMONY
FOR THE PLAINTIFF

CHARLES E. STREET

previously called as a witness by and on behalf of the defendant, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Seering:

Q. Now, Mr. Street, at the time when the Foster Transfer Company submitted the low bid for the contract with your division, you did not want to award it to them, is that right?

A. I wouldn't say that; no, sir. We had the question of whether they could do the job or not.

Q. Isn't it a fact that you were not going to award the contract to them and that you were prevailed upon to go out and look at their equipment?

A. No, sir.

Q. And you finally did go?

A. That is not a fact; no sir.

Q. You finally did go? A. Yes, we did.

Q. And from what you saw of their equipment you thereafter awarded the contract?

A. What we saw of their equipment and what we were told about [259] rental agreements with other operators, and on the basis of personnel and all of the picture we then did award the contract.

Mr. Evans: Speak up louder. I am having difficulty hearing.

Q. (By Mr. Seering): You were satisfied with what you saw of the equipment and the facilities that they had?

(Testimony of Charles E. Street.)

A. Generally speaking, yes. As I stated before, we were also impressed with the sincerity of the men and their desire to do a good job, and we thought they could do a good job.

Q. Now, that contract took effect July 1st?

A. July 1st.

Q. During the first two or three weeks you had no difficulties at all?

A. I don't recall of any in the first two weeks.

Q. The first problem that came up was the question of some demurrage on a carload of paper on July 20th, is that right? Do you recall that?

A. I don't recall that, Mr. Seering.

Q. You do not recall the incident at all?

A. No, sir.

Q. You have no recollection of a carload of paper having been out here on the track for a week or more?

A. Yes, I heard about it, but I was not directly concerned [260] with it nor took no part in it, as I recall.

Q. And isn't it a fact that you asked Mr. L. H. Doolittle, who testified here, to absorb the demurrage on that shipment?

A. No, sir; I don't remember that.

Q. Would you deny that you did, or don't you just remember?

A. Well, that would be hard to say. I would hate to say that I didn't, but I don't recall doing it.

Q. That, of course, would have been improper

(Testimony of Charles E. Street.)
for him to do, would it not, and charge it against the government on some other transaction?

A. That would have been, indeed.

Q. Now, as to these conferences which are covered by letters of August and September, 1945, one of those conferences was initiated by Mr. Doolittle himself; that is correct, is it not?

A. I couldn't say whether that is correct or not. The one of August 26th, was not.

Q. Do you remember reading the letter—I believe it was in September—in which Mr. Doolittle requested the conference and had several requests to make of your organization for the possible improvement of the service?

A. Will you restate the question, please?

Q. Do you recall that the conference in September was initiated by Mr. Doolittle and that he made several suggestions and [261] requests of you for the purpose of improving the service?

A. Well, I was not in on that conference in September.

Q. All right. Now, were there any other conferences in regard to complaints?

A. Not conferences; no, sir.

Q. I believe you stated at the outset of your testimony that the total number of complaints you had was eight or nine.

A. I would guess now—I am trying to recollect—that that may have been somewhere in the neighborhood of it.

(Testimony of Charles E. Street.)

Q. And that was covering the period of July 1st to the termination of the contract at the end of February, 1946?

A. Mostly from the beginning of the contract through December, I would say.

Q. And during that time do you have any idea what the total number of individual jobs were that were performed by the contractor?

A. All that I know is that I heard Mr. Doolittle testify that there were between twelve and fourteen hundred jobs performed.

Q. You would have no way of verifying it?

A. We get no reports from other agencies.

Q. Does that sound as if it was a reasonable figure? A. Well, I am unable to say.

Q. Now, do you mean to tell us that you received absolutely no complaints on the service of the City Transfer Company [262] before or after the Foster Transfer contract?

A. That is correct, Mr. Seering.

Q. Now, isn't it a fact that especially on moves of household goods you frequently get complaints?

A. We did under this contract, but not otherwise.

Q. And isn't it a fact that under all your contracts that type of service leads to complaints?

A. No, sir.

Q. You, of course, are not aware of all the instances that might occur, are you?

A. We wouldn't know unless they reported them to us.

(Testimony of Charles E. Street.)

Q. You wouldn't know?

A. Unless they reported them to us.

Q. In other words, you specifically have no knowledge of a claim on behalf of a Commander Madison against the City Transfer for the disappearance of some of his household goods when he was moved here by City Transfer—moved from Seattle?

A. This is the first time I ever heard of it.

Q. You never did?

A. No, sir, I never did.

Q. And did you ever hear of the incident of the dropping and breaking of some I.B.M. machines by City Transfer Company in a move for War Assets?

A. No, sir; this is the first time I ever heard of that. [263]

Q. Now, in regard to the Invitation, Bid and Acceptance of December 6, 1945,—that is the correct date, is it not?—covering the job on the Wallingford move? A. That sounds correct; yes, sir.

Q. Did you furnish Foster Transfer Company with a copy of that Invitation, Bid and Acceptance?

A. No, sir; we did not.

Q. Why?

A. There were several considerations of the transaction at that time, and if you would like, I will tell you what they were. We had a question in mind, whether or not the Foster Transfer Company could do the job, because we considered it to

(Testimony of Charles E. Street.)

be a complicated job—it consisted of removing stock and relocating it and keeping it in sequence—and in the light of our own experience, and the reports we had from others, we doubted whether they could do the job. We also questioned whether there would be sufficient equipment to handle other work which they might be called upon to do the job. The other question was, whether it was proper to have the work done under the contract which is an open end contract with time one of the main factors in payment. Our job was a specific job involving a certain amount of tonnage, a certain amount of dollar value under known conditions and the contract such as we had, the open end contract with the hourly rates and the equipment rates [264] contemplated any type of service that the government or any of its agencies might require which we did not know about, whereas, in this case we knew specifically what the job was that had to be done. So all of those things were considered and it was decided that possibly—or that probably Foster Transfer would have their hands full with the contract they had and should not undertake the other contract simultaneously.

Q. And you recall the incident of my writing a letter and making a demand for that work under the existing contract? A. Yes, sir.

Q. And whether it was you or Mr. Clark, do you recall that I had a number of telephone conversations with your office on the matter?

A. I believe that I heard that you did. I think, perhaps, they were with Mr. Clark.

(Testimony of Charles E. Street.)

Q. Mr. Clark was acting under your direction, was he? A. Yes, sir.

Q. And in all of that conversation and correspondence never once was there any mention of the fact that Foster Transfer Company was not qualified to do this work; now, is that not true?

A. I believe that is correct, according to the correspondence. I don't know what was said in the conversations.

Q. Despite the fact that you had this history of complaints, [265] and the memorandum which was just read in which you state unqualifiedly that in practically every instance the service was inadequate, the men were late, the equipment was not satisfactory, in the negotiations on this big move never once was the quality of their service mentioned, is that correct?

A. That I wouldn't know unless it was mentioned in a conversation.

Q. The only question as to awarding that move under their existing contract that was raised by your office was the question as to whether that contract contemplated this type of a move, is that not correct?

A. And whether it could be done in approximately the time that was set up and for approximately the same amount of money.

Q. And in that correspondence you sought to make the Foster Transfer Company guarantee performance within seven days?

(Testimony of Charles E. Street.)

A. That had been discussed with them and it had been temporarily agreed that they could do it, and they said they could on the basis of the discussion.

Q. Did you read the correspondence?

A. Yes, sir.

Q. There is no guarantee of seven day performance therein, is there?

A. No, there is no guarantee, but it is stated in our [266] correspondence—or in our letter of December 14th it is stated on the basis of a verbal discussion wherein we were told that the main job could be done in seven days and with so many pieces of equipment and so many men, and so forth. It is related to that fact.

Q. You were informed that barring unforeseen circumstances they made an estimate of seven days on the Wallingford move, is that right?

A. That is correct.

Q. And, as a matter of fact, your low bidder made an estimate of nine days, didn't he?

A. That is correct.

Q. And, as a matter of fact, Foster Transfer did the job in twelve days?

A. Not according to our records.

Q. Did the Wallingford move—13; I am corrected. A. That I cannot say.

Q. Now, you have referred to the low bid. What were the other bids on that job?

A. May I refer to the record?

A. Yes, you may. A. Let's see, that——

(Testimony of Charles E. Street.)

Mr. Evans: That is A-11, I believe.

(Exhibit A-11 presented to witness.)

A. One of the other bidders broke his bid into two parts [267] covering the two jobs, and here are the separate figures: $4839 for one job and $1841 for the other portion.

Q. That is a total of $6680 for the total job?

A. That looks approximately correct. And the other bidder, other than the Martin Transfer Company—who were low—was $2575 and $2150.

Q. That is $4725. And Martin was forty——

A. $4500.

Q. $4500. Now, it has been testified here, I believe by Mr. Hallam, that for three days the job was set down by agreement between him and you because of the weather.

A. That is correct.

Q. You deny that?

A. I deny that; yes, sir.

Q. It has also been testified that the elevators were not operating and that that held the job up at least several days. Is that correct?

A. That is only partially correct.

Q. Well, what is the fact?

A. As I recall, one elevator was down for approximately a half a day. We had the same elevator, or another one—I believe there was only one there—that was down for two hours. Now, we did have some five minute interruptions because fuses would blow out, and things like that, but those were

(Testimony of Charles E. Street.)
the only two major breakdowns that I recall—one of approximately half a day and one of two hours.

Q. Now, as far as you know, no complaint has ever been filed by anyone against the Foster Transfer Company's bond?

Mr. Evans: I am going to object to that cross-examination. It is immaterial.

The Court: Overruled.

A. I am not sure about that, Mr. Seering. The records indicate there may have been filed something against their bond by an employee whose goods were damaged in moving.

The Court: By an employee of whom?

The Witness: An employee of the Fish and Wildlife Service.

The Court: You mean a government agency having the right to receive service under this contract; is that what you mean, or do you mean something else?

The Witness: Not quite that. This particular employee, some two years later in taking his goods out of storage, found that there was considerable damage, and we understood that this employee was filing a claim with his insurance company, which was the General Insurance Company, who in turn were going to try and get relief from the bonding company.

Q. Where were these goods stored?

A. In Chicago, I believe. [269]

Q. That is the only incident that you know of?

(Testimony of Charles E. Street.)

A. That is the only incident I know of—where the bond may have been brought into play.

Q. Now, before the cancelation of the contract in February, did you consult any of the other government agencies generally as to their experiences with the Foster Transfer Company?

A. No, sir.

Q. You are aware of the fact that a considerable number of the representatives of those agencies have indicated, as shown under the exhibits here, that the services were entirely satisfactory?

A. Is have seen the list; yes, sir.

Q. You are also aware of the fact that a number of those agencies have preferred to continue the services of Foster Transfer?

A. No, that I am not aware of.

Q. Did you know that the Port is still using them? A. No, sir; I did not.

Q. You don't know that? A. No.

Q. Do you know that the Army Engineers are still using them? A. No, I do not.

Q. You made no effort to find out the experience of those agencies? [270]

A. We did not make a survey.

Q. As a matter of fact, about the only work that your agency directly had for Foster was this Wallingford move?

A. Plus certain other jobs that were done.

Q. And on that Wallingford move, I believe you said that you were out there specifically to watch the quality of their services?

(Testimony of Charles E. Street.)

A. Not specifically, but with that being one of my jobs.

Q. And that was brought to a head by the fact that they had insisted upon the award of this work under their existing contract?

A. No, I don't believe that is correct.

Q. Now, about those disallowances to which you testified, is it true that the billings of the Foster Transfer Company are based on Exhibit 5, which are work tickets signed by your representative in each instance?

A. It appears that is the case now.

Q. So that in every case, even though you later questioned the item, your representative on the job certified the correctness of that work ticket?

A. That was not the intention, Mr. Seering. We had no agreement that we would keep their time and report on the number of hours they worked, and so forth. It was only an indication that part of the job was being done on that date. It was not a timekeeping proposition. [271]

Q. Well, there is no purpose, then, in his signing that work ticket at all?

A. No. It indicates that there were people working, yes, but not eight hours or seven, or something else. These people who signed these were workers. They were not timekeepers.

Q. Isn't it the practice generally for the shipper to sign and okay a work ticket such as this?

A. No, I don't think so.

(Testimony of Charles E. Street.)

Q. Isn't it the practice of the government on work such as this to have supervision?

A. We didn't contemplate it on the job.

Q. Now, you talked about this shelving, about which we heard something yesterday. That refers to the shelving that was moved in from Auburn, I believe.

A. Auburn or Renton. I don't recall which.

Q. It was loaded by the War Assets Administration out there, is that right?

A. That I don't recall.

Q. And you said that Mr. Doolittle didn't seem to know what to do about getting it off of there. Now, what would you have done to get it off?

A. I am not in the trucking business.

Q. Well, you have set yourself up in this instance to judge as to his incompetence in getting it off. Now, you said [272] he didn't seem to know what to do and finally Mr. Sbinden authorized the dismantling of the shelves. Now, as a matter of fact, wasn't that the only way to get them off?

A. I don't think it was.

Q. And you refused to permit taking them apart causing all that delay, isn't that right?

A. Well, that I can't say.

Q. Now, also, in your memorandum you referred to the Alaska Communications System having requested a closed van and having received an open van. Now, the fact there was that they did not request the closed van; that refers to the instance of of lift-gate request, doesn't it?

(Testimony of Charles E. Street.)

A. I am not sure that does. That, in my opinion, is a separate transaction.

Mr. Seering: No further questions.

Redirect Examination

By Mr. Evans:

Q. At the time when you went to the Foster Transfer Company to interview them at the beginning of this contract—before the contract was let—did you actually inspect their equipment or did you merely take the list?

A. We merely took the list. There wasn't, as I recall, but one or two trucks available to be seen, but we were assured that the equipment was available as represented by the [273] list; also, that they had operating agreements with some 75 other trucking operators for the acquisition of additional equipment that might be required for peak loads or unexpected situations. There was no equipment available at the time.

Q. Then you actually saw, perhaps, only one or two trucks?

A. As I recall, that was the case.

Q. Now, in regard to this insinuation that you told Mr. Doolittle to charge the demurrage off on other bills to the government, have you ever in your life done anything like that? A. No, sir.

Q. If you had ever done anything like that, would you remember it?

A. I think I would; yes, sir.

Q. On that basis, can you state now whether

(Testimony of Charles E. Street.)

or not you ever told Mr. Doolittle to absorb that demurrage in some other contract?

A. I don't think that I did. I don't believe that I would have done that.

Q. Now, as I understand your cross-examinaton, you state that there was some eight or nine complaints received from other agencies. There were also other complaints from your own agency, is that correct?

A. Such as Mr. Winder recited this morning.

Q. And from your own observation?

A. No, I would not have seen that directly. It would have come to me through channels.

Q. Well, some of these observations that you made you saw yourself?

A. In connection with the warehouse move.

Q. I will ask you whether or not you considered the warehouse move as being one that required special and different equipment from that required under the general contract?

A. We thought that perhaps it would in the way of trucks, that is, small warehouse trucks and other equipment not normally contemplated in a general drayage contract.

Q. Now, where was the bulk of the merchandise to be moved in this move?—at Wallingford or 8th Avenue? A. Wallingford.

Q. About what percentage would you say was at each place?

A. I would break it down roughly as about 65 and 35, or maybe 60/40.

(Testimony of Charles E. Street.)

Q. From your investigation as to the elevators breaking down down here on 1st Avenue, do you have any information as to the cause of those elevators breaking down?

A. I was told by our man who was at that end, Mr. Sbinden, that part of the difficulty, or most of it, was overloading; that he had cautioned the men about putting the rated capacity on and that they continued to load it up with [275] pallet boards and other merchandise to the place where she wouldn't take it and broke ropes and cables and wheels and various things like that. At the time of this 4-hour delay, it was quite a break-up.

Q. Whose men were these overloading the elevators? A. It was the contractor's operation.

Q. Now, in regard to this list of people who stated their services were satisfactory, have you made any investigation as to whether or not those people were persons who were authorized to make such a commitment on behalf of the government?

A. We have; yes, sir.

Q. Were those people in a position where they were so authorized?

A. Some of them were not.

Mr. Evans: No further questions.

Mr. Seering: I have no questions.

The Court: You may step down.

(Witness Excused.)

The Court: Call your next witness.

Mr. Evans: I will call Mr. Clark. [276]

G. KENNETH CLARK

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, and spell your last name for the reporter, please?

A. G. Kenneth Clark, — C-l-a-r-k.

Q. Where are you now employed, Mr. Clark?

A. U. S. Treasury, Bureau of Federal Supply.

Q. In what capacity?

A. As Assistant Chief, Purchase Division.

Q. How long have you been in that capacity?

A. About two years.

Q. How long have you been with that particular agency?

A. Since 1944—November.

Q. Now, I will ask you whether or not since about October, 1947, you were in a position where if any complaints were received on the drayage contract they would have come to your attention?

A. Yes, I was,—as assistant chief of the division.

Q. I will ask you whether or not you have received any complaints on the drayage contract which has been in force since about October, 1947, which is of a similar nature to the one Foster had?

A. No, I have not.

Mr. Evans: Now, in order to shorten this testi-

(Testimony of G. Kenneth Clark.)

mony and comply with the Court's wishes, Mr. Clark could corroborate some of Mr. Street's testimony in regard to these conferences. I will not go into it any further unless counsel wants to cross-examine on it.

Mr. Seering: No.

Mr. Evans: If your Honor has no further questions in regard to that, I will not interrogate this witness further.

The Court: I do not wish to inquire.

Mr. Evans: No further questions. I would like to ask that Mr. Clark be excused. I understand that he has an appointment at 4:00 o'clock.

Mr. Seering: I have just a question or two.

The Court: You may inquire.

Cross-Examination

By Mr. Seering:

Q. Do you recall your telephone conversations with me, Mr. Clark, on the occasion of the Wallingford move and our demand that the work be proffered under our existing contract?

A. I recall that we had some conversation on the phone.

Q. And it is a fact, as set forth in your letter, that the [278] chief question raised in that discussion was as to the propriety—or rather as to whether the existing contract contemplated this type of a move on a large scale?

A. I believe that is correct. Could I add to that?

(Testimony of G. Kenneth Clark.)

Q. Yes.

A. We believed that our existing contract did not require that the Foster Transfer Company be used on that kind of a move. We weren't too satisfied with their performance by reason of these complaints and—but we didn't want to bring the thing to an issue if it could be avoided or handled in a more or less gentlemanly fashion by excluding Foster Transfer from the move on the grounds that it wasn't contemplated under the existing contract and letting a separate contract for it. That is what we had in mind, I am sure.

Q. You did not want to exclude them from performing the work, you said?

A. We did. We didn't want them to perform the work because we were not satisfied with their service under the contract. We therefore wanted to get out a separate bid for it, but we didn't want to stir up any trouble with the contract in that manner.

Q. And in all your discussions with me, and in your correspondence, you never raised a single question as to the quality of the service or to their ability to perform? [279]

A. I don't recall that I did.

Mr. Seering: That is all.

Mr. Evans: No further questions.

The Court: You may be excused.

The Witness: May I be excused?

The Court: Is there any objection to the witness' request that he be excused?

Mr. Seering: No objection.

The Court: You are so excused.

(Witness Excused)

The Court: Call your next witness.

Mr. Evans: Mr. Ihlanfeldt, please.

WILLIAM B. IHLANFELDT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name? And spell your last name for the reporter, please.

A. My name is William B. Ihlanfeldt, I-h-l-a-n-f-e-l-d-t.

Q. Where are you employed, Mr. Ihlanfeldt?

A. The Bureau of Federal Supply. [280]

Q. In what capacity?

A. As manager.

Q. Over how large an area does your jurisdiction extend?

A. Well, the four northwest states.

Q. Which ones?

A. Idaho, Montana, Oregon and Washington, and the Territory of Alaska.

Q I will ask you whether or not your agency

(Testimony of William B. Ihlanfeldt.)
used to be called the Procurement Division of the Treasury Department?

A. That is right.

Q. I will ask you whether or not it was your decision to terminate the contract with the Foster Transfer Company?

A. It was.

Q. I will ask you whether or not your decision to take that action was based on reports made to you by your subordinates?

A. That is true.

Q. Referring to Exhibit A-6, that portion which is from page 13 approximately on, I will ask you whether or not all the information contained therein was available to you at the time you made your decision?

A. It was.

Q. I will ask you whether or not that file is the file of your office which was furnished to the Treasury Department in connection with the appeal made by the Foster Transfer [281] Company?

A. It was.

Q. Now, you have heard the testimony, I believe, of Mr. Street.

A. Yes, sir.

Q. Now, in order to shorten this, I will ask you whether or not you were familiar with the substance of what he testified to here in regard to these complaints?

(Testimony of William B. Ihlanfeldt.)

A. I was, and I am.

Q. And I will ask you whether or not it was on the basis of those complaints and the information which he gave you, as he testified to here, that caused you to make the decision that it was necessary to terminate this contract?

A. Yes, sir.

Q. I will ask you whether or not you considered it within your discretion to exercise the right of the Government under paragraph 21 of the Special Conditions of the contract to terminate the contract?

A. Yes, sir.

Q. I will ask you whether or not in your opinion, and in your capacity as manager, you could in good faith keep the contract in force, considering your duties and responsibilities?

A. On the basis of the information that was made available to me, I felt I would be derelict in my duty if I were to [282] continue the contract.

The Court: Did you participate in the decision of how much notice should be given to the transfer company of cancellation or intention to cancel?

The Witness: Yes.

The Court: Do you recall why more notice was not given of the effective date of cancellation before the occurrence of that date?

The Witness: Yes, I recall. I had a talk with Mr. Street and others on my staff who informed me that under the terms of the contract we could terminate without notice. They referred to a stipu-

(Testimony of William B. Ihlanfeldt.)
lation within the contract which was to the effect that the government could terminate on the basis of just cause, or something of that sort,—I have forgotten the language—and in determining—or making that decision, I took into account the fact that we had given the contractor, in my opinion, sufficient time within which to demonstrate his capacity to perform the work.

Q. And in that regard did you take into consideration the statement in the contract that it could be canceled at any time——

A. I am sorry, I don't follow you.

Q. I will rephrase the question. This particular provision of the contract provides that the government reserves the [283] right to cancel the contract at any time for what it deems sufficient cause. I will ask you whether or not in your administrative capacity in canceling this contract you took into consideration whether some notice should be given? A. Yes.

Q. I will ask you if it was your decision to give him until the first of the month, or until the last day of February, whichever it was?

A. If that is what we did, yes.

Q. I will ask you whether or not you ever had a conversation with Mr. Doolittle on or about September 26, 1946? A. Yes, I did.

Q. I will ask you whether or not any discussion took place at that time with regard to the prices which were being charged by the Foster Transfer Company? A. Yes, there was.

(Testimony of William B. Ihlanfeldt.)

Q. And was that with the young Mr. Doolittle or the elder Mr. Doolittle?

A. It was the elder Mr. Doolittle.

Q. Now, I will ask you whether or not he was representing the Foster Transfer Company at the time he was there? A. He was.

Q. What if any complaints did he make about the prices being charged? [284]

A. Well, he said approximately this: "Mr. Ihlanfeldt, I am losing money on this contract and I wonder what you can do to help me." And my question was: "To what do you attribute your losses?" And he said that there was a great preponderance of small shipments—up to a thousand pounds, or less than a thousand pounds—of household goods and other small packages and that he couldn't come out, as he put it, on the contract and asked me whether there was any way in which I could amend that contract to help him. And at that time I recall I asked my secretary to get the complete file and the previous bids—or the bids that were considered at the time of the original award to Foster Transfer, and I determined to his satisfaction, because I referred the file to him, that there were other bidders who had—at least one other bidder who had bid the same price for the small shipments as had Foster Transfer Company, and I told him that I could see no way by which I could grant him any relief.

Q. I will ask you whether or not he appeared

(Testimony of William B. Ihlanfeldt.)
to be serious in his complaint that he wasn't making any money on the contract?

A. Yes, indeed.

Q. Now, as a result of that conference you wrote the letter of September 26, 1945, which I believe is on page 38. A [285] copy of it is on page 38 of that file there before you. A. Yes.

Q. Now,——

Mr. Evans: I do not want to bore the Court with more reading. I believe portions of this contract have been read before.

The Court: Yes. I think you can call the Court's attention to it in the course of your arguments.

Mr. Evans: I will, Your Honor. I will avoid reading this at this time other than to state that it makes reference to the complaint about not being able to make any money.

Q. (By Mr. Evans): Now, I will ask you whether or not any complaints have been received by your office on the performance of other contractors on contracts such as this since the Foster contract was terminated?

A. None has come to my attention.

Q. I will ask you whether or not—if any complaints had been received, whether or not you would have been informed?

A. Definitely. That is the policy of my office.

Q. I will ask you whether or not the contractor who had this same type of contract prior to the Foster Transfer Company caused any complaints to be made to your office? A. None. [286]

(Testimony of William B. Ihlanfeldt.)

Q. And how long have you been in the capacity where you would have known about those complaints? A. Since March, 1944.

Q. I will ask you whether or not in arriving at your decision to terminate this contract you gave any consideration to the added cost to the government in procuring a new contract?

A. Indeed I did. It is a costly job, this business of advertising and consideration of bids, the preparation of abstracts, the ultimate decision to award the contract, all the information matter that attends the awarding of a contract. The notification, as in this case, went out to some 80 or 90 federal agencies and I wanted at all cost, or any reasonable cost, to avoid cancellation, and that was the subject of my discussion on September 26th when I talked to Mr. Doolittle.

I urged him at that time to do whatever he could to eliminate the cause of these complaints, and told him also that it wasn't only this contract that we were talking about but that since he was in the transfer business, the hauling business, it was entirely possible that the government might have and would have additional hauling or drayage contracts of this or of some other nature in the future and that I wanted him to be successful in this case so that he might be given consideration and an [287] opportunity to bid on other government business in the future. He said he understood that, and he was a most courteous and gentlemanly sort

(Testimony of William B. Ihlanfeldt.)
of fellow. He seemed very cooperative and responsive to suggestion and I believe he was—he tried sincerely to do a better job, or that he would attempt to. He left me with that impression.

Q. I will ask you whether or not the performance—the actual performance of the Foster Transfer Company showed any improvement?

A. It did not.

Q. Now, I will ask you whether or not the cost of letting a new contract in any way deterred you from your decision to cancel this contract?

A. I gave it considerable thought; yes, sir. But I felt that it was in the interest of the government and the American taxpayer, the United States taxpayer, to take the action I took.

Q. Now, I will ask you whether or not there is any policy followed by your office to favor small businesses rather than large firms?

A. Generally that is the attitude and policy of the Director of the Federal Bureau of Supply, and it is obviously our attitude as well.

Q. I will ask you whether or not at the time of the award of this contract, June of 1945, you gave any consideration to [288] that policy in awarding this contract to Foster Transfer?

A. Yes, I gave it thought. I didn't—I don't think it was a major consideration. The important facts were that my boys, Mr. Street and others, assured me that on the basis of their discussions with Mr. Doolittle, his apparent sincerity, his promises

(Testimony of William B. Ihlanfeldt.)

of equipment and labor, and a labor pool, and also in view of the fact that his was the low bid, I had no concrete evidence with which—upon which to base any other decision. But I did think about this matter of favoring the small dealer or the small operator whenever other conditions are equal. That is still our policy.

Mr. Evans: You may cross-examine.

Cross-Examination

By Mr. Seering:

Q. Most of the information on which your action was based came to you through your subordinates? A. That is true.

Q. You, yourself, did not directly go out on the job? A. No, sir.

Q. And did not have direct information. Now, at the time you canceled this contract you were under the impression that you had no obligation to give any reasons for your cancellation, is that correct.? [289]

A. That is true, but——

Q. And you so stated in your answer to me?

A. That is true.

Mr. Seering: That is all.

Redirect Examination

By Mr. Evans:

Q. As I understand, you did write Mr. Seering a letter and gave him the terms under which you were canceling the contract?

(Testimony of William B. Ihlanfeldt.)

A. Yes. I said that under our interpretation we had to give him no information, but that I was very glad to do it. Mr. Doolittle and his company were always apparently sincere and cooperative and I thought it was the gentlemanly and right thing to do, and we did that.

Mr. Evans: No further questions.

Mr. Seering: No further questions.

The Court: You may step down.

Call the defendant's next witness.

(Witness excused.)

Mr. Evans: I call Mr. Walsh. [290]

JEREMIAH J. WALSH

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please?

A. Jeremiah J. Walsh.

Q. Where are you employed, Mr. Walsh?

A. City Transfer and Storage Company.

Q. In what capacity?

A. As the accountant.

Q. Now, in such capacity I will ask you whether or not you are familiar with the contract between the City Transfer Company and the government, particularly the Bureau of Federal Supply?

(Testimony of Jeremiah J. Walsh.)

A. Well, I am familiar with several phases of the contract; not all of the contract.

Q. I will ask you whether or not you are familiar with the bookkeeping and accounting part of that contract? A. Yes, I am.

Mr. Evans: I think I might be able to stipulate with counsel and save considerable time.

The Court: You may confer.

Mr. Evans: May I have this marked, please?

(Summary of Total Billings by City Transfer Company made under contract with U. S. Treasury Dept., March 1, 1946, to June 20, 1946, marked Defendant's Exhibit #3 for identification.)

Mr. Evans: It will be stipulated between opposing counsel and myself that Defendant's Exhibit A-13 is a summary of the business done by the City Transfer Company between the dates of March 1, 1946, and the last day of June, 1946, under the contract which would have been Foster's had it not been canceled and that the figures thereon are taken from the books and records of the City Transfer Company and prepared in this form so that we wouldn't have to go through these books.

May it be so stipulated?

Mr. Seering: It is so stipulated.

Mr. Evans: And that it may be admitted in evidence,—the summary?

Mr. Seering: Yes.

The Court: Do you offer A-13 now?

(Testimony of Jeremiah J. Walsh.)

Mr. Evans: I offer A-13.

The Court: Defendant's Exhibit A-13 is now admitted.

(The summary heretofore marked Defendant's Exhibit A-13 for identification was received in evidence.)

Q. (By Mr. Evans): Now, Mr. Walsh, are you familiar with the contract rates under the contract which your company has with the Treasury Department as compared with the [292] rates of other customers of City Transfer? A. Yes.

Q. I will ask you to state whether or not the rates which are charged to the government under your contract are approximately equal to, less than, or greater than the same prices which you would charge other individuals.

A. Less than the same price we would charge our normal business.

Q. In other words, the government gets a break on the prices?

A. Well, it is competitive bidding and, of course, it is lower.

Q. Now, I will ask you whether or not during the year 1946 the City Transfer Company made any money?

A. In the year 1946, the City Transfer Company lost approximately $1500.

Q. I will ask you whether or not you have with you a report put out by the Department of Transportation, State of Washington, in regard to prof-

(Testimony of Jeremiah J. Walsh.)
its and losses of transfer companies in the State of Washington? A. Yes, I have.

Q. Do you have it up there with you?

A. It is back in the seat.

Mr. Evans: May I move back and get it, Your Honor?

The Court: You may do that.

Q. Now, what is the name of that document which you have there? [293]

A. The name of this is Statistics of Class I Common and Contract Motor Carriers of Property for the year 1947. It is published by the State of Washington, Department of Transportation, the Accounting Section, Olympia, Washington.

Q. I will ask you whether or not in that report there is a summary of the percentage of profit made by all the carriers that are in that class in the State of Washington?

A. Yes, there is.

Q. Will you turn to that page, please?

A. Yes, sir.

Q. Under what classification and types of work is that listed? I believe there are three, aren't there?

A. Yes. General freight carriers (a). Local cartage carriers and household goods carriers.

Q. What percentage of profit is shown under general freight?

The Court: Can you not specify the thing that is material here? And since this man is probably put on the stand as an expert, use conclusions and

(Testimony of Jeremiah J. Walsh.)

be as brief as possible. I think I will have to advise counsel on both sides that all the time that is consumed from now on in the trial of this case will have to be deducted from the time available for argument.

You may proceed. [294]

Mr. Seering: I object to the question on the ground that profits of motor carriers in general has no bearing here. We do not know the factors involved in the returns there. I do not see that it proves any issue in this case at all.

Mr. Evans: Your Honor, here is a report put out by the State as to the profits and losses, and their percentage, of all the carriers under Class I in the State of Washington. I believe this is competent evidence to determine the anticipated profits which this company might or might not have made during the ensuing term of their contract and I believe it is evidence the Court can take into consideration as to the percentage of profit.

The Court: Well, isn't there some shorter way of getting at it?

Mr. Evans: Well, I believe this is going to be very short, Your Honor. It is just going to be a matter of giving three figures and we will be through.

The Court: Very well. The objection is overruled.

Q. (By Mr. Evans): Under general freight what was the percentage of profit in 1947?

The Court: That is if general freight is involved

(Testimony of Jeremiah J. Walsh.)

here. Do both sides agree that any activity of this plaintiff comes in that category? [295]

Mr. Seering: We agree.

The Court: All right.

A. In 1947?

Q. Yes.

A. Net carrier income, before income taxes, 6.01 per cent.

Q. And "Local Hauling," the next column there, what is the percentage?

A. In 1947 the percentage was 0.46.

Q. And as to the "Household" column?

A. 0.10.

Q. I will ask you whether or not you have the report for 1946?

A. This is the comparison. We have also 1946 in here.

Q. The figures which you have read are for 1947? A. Yes.

Q. Can you give me the same three figures for 1946?

A. Yes. Under "General Freight Companies" the figure is 3.19. Under "Local Cartage Carriers" the figure is 3.37. And under "Household Goods Carriers" the figure is 2.62.

Mr. Evans: No further question.

Mr. Seering: I have no questions.

The Court: You may step down. Call your next witness.

(Witness excused.) [296]

Mr. Evans: I believe I am ready to rest now, Your Honor. If I may have just a moment.

The Court: You may. The Court will be at recess for five minutes.

(Whereupon a five-minute recess was taken.)

The Court: You may proceed.

Mr. Evans: The defendant rests, Your Honor.

The Court: The plaintiff may proceed.

Mr. Seering: Mr. Conley.

REBUTTAL EVIDENCE FOR THE PLAINTIFF

JOHN E. CONLEY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Seering:

Q. Will you state your full name, please?

A. John E. Conley.

Q. And where do you reside?

A. Seattle, Washington.

Q. By whom are you employed?

A. Port of Embarkation.

Q. By whom were you employed prior to that?

A. War Assets Administration. [297]

Q. And did you work under—I believe it was Mr. Smith who testified here today?

A. I didn't see Mr. Smith, but I worked under Mr. Smith.

(Testimony of John E. Conley.)

Q. That is Erving Smith? A. Yes, sir.

Q. And what were your duties?

A. I was chief of the office, Service Division, which had to do with the moving of equipment and various service functions.

Q. And Mr. Smith was your supervisor?

A. He was my boss, yes.

Q. As between the two of you, who had direct contact with the transportation work?

A. I had direct contact with the work actually being done.

Q. And did you have experience with the work performed by the Foster Transfer Company?

A. Yes, sir.

Q. Tell us about the quality and character of the service furnished by that company to your agency.

A. Well, they did just one job that I recall vividly. It was a large job. We moved from 2005 5th Avenue to the Textile Tower and at that time they did a good job.

Q. What was the nature of that job?

A. Well, it was moving our furniture, I.B.M. equipment, et cetera, to the Textile Tower from 2005 5th Avenue. [298]

Q. Was that what would be regarded as a difficult move? A. Well, I would say yes.

Q. And it was handled well, was it?

A. Yes.

Q. Do you have any experience with—or did

(Testimony of John E. Conley.)

you have any experience with the City Transfer on the moving of any I.B.M. machines?

A. Yes. They moved our equipment later on.

Q. Did they have any accident in that connection?

A. They dropped one machine at one time.

Q. Is there anything else about the quality of their service that you can recall?

A. No, I believe not.

Q. Was there adequate supervision furnished by the company?

A. On this job that I explained, yes. I was on one end of the job and Mr. Hallam was on the other end and we stayed right with it until we finished.

The Court: What was the address from which that move was made?

The Witness: Sir?

The Court: Was it 2005 5th Avenue from which you moved?

The Witness: Yes, sir.

The Court: What building is that? If you know.

The Witness: It originally was the Wilson Business [299] College building.

The Court: Is it across from any other well known business establishment?

The Witness: Yes, sir. It is across the street from the Benjamin Franklin Hotel.

The Court: Diagonally across.

The Witness: Diagonally across.

The Court: Thank you.

(Testimony of John E. Conley.)

Proceed.

Mr. Seering: You may examine.

Cross-Examination

By Mr. Evans:

Q. You say you were at one end? A. Yes.

Q. Which end were you on?

A. The Textile Tower end the biggest majority of the time.

Q. Are you a personal friend of Mr. Hallam?

A. I know the gentleman.

Q. Mr. Smith was your superior?

A. Yes, sir.

Q. And you were not at the moving end all the time, were you? A. No, I wasn't.

Q. So you would have no knowledge of what was going on there? [300]

A. Yes. I was going back and forth. I was expediting the job. That was a part of my job.

Q. How long did it take to make that move?

A. Well, roughly—I don't recall. I might say 10 or 12 hours. I don't recall exactly.

Q. Was it necessary for the government to have a man on the job to expedite the services of a contractor?

A. No, I wouldn't say that it was necessary to have a man there.

Q. Well, then, why were you expediting it?

A. I probably used the wrong word. I was seeing that our organization was ready to go to work the following morning.

(Testimony of John E. Conley.)

Q. Well, now, isn't it a fact that the move was supposed to be made on August 20th starting at 8:30 and the trucks didn't show up until 2:30 on that day? A. I don't recall that.

Q. Do you recall the date of the job you are referring to? A. I don't recall the date.

Q. You don't know whether it was the same job Mr. Smith previously referred to or not?

A. No, I do not. I didn't hear Mr. Smith's testimony.

Mr. Evans: No further questions.

Mr. Seering: That is all.

May the witness be excused? [301]

Mr. Evans: I would also like to ask that Mr. Walsh be excused.

The Court: Any objection?

Mr. Seering: No objection.

The Court: Each of those persons may now be excused from further attending this trial—Mr. Walsh and Mr. Conley.

Mr. Seering: I will call Mr. Browne.

CLARENCE BROWNE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Seering:

Q. Will you state your full name, please?

A. N. Clarence Browne.

(Testimony of Clarence Browne.)

Q. And where do you reside?

A. Seattle, Washington.

Q. What is your occupation?

A. I am a salesman at the present time.

Q. During the year 1945, and early 1946, what was your occupation?

A. I think that was the date in which I was employed by the Lend Lease Division of Treasury-Procurement.

Q. And what were your duties in connection with the Lend [302] Lease Division of Treasury-Procurement?

A. Well, I had charge of various sections; one was the storing and the traffic pertaining to the handling of freight—general freight that came under the Lend Lease operation.

Q. As such did you have contact and first-hand experience with the transportation services that were furnished the department under its several contracts? A. That is right.

Q. Did you in the course of your duties become acquainted with and have experience with the Foster Transfer Company? A. Yes.

Q. When did you first have contact with them?

A. I can't be sure of the dates. It was during that period in which I was employed by the Treasury. We used them at various times on the picking up and the storing of UNRRA clothing and so forth.

(Testimony of Clarence Browne.)

Q. Do you recall an incident of some demurrage on a shipment of paper?

A. I don't recall what the commodity was now, but we were called by the railroad stating that there was a car on which demurrage was piling up and asked if we might do something to expedite it, or thought that it might be under our jurisdiction, but it was not.

Q. It was not? [303] A. That is right.

Q. What did you do in regard to that matter?

A. I notified—I think probably it was Mr. Clark who would handle that particular phase of it.

Q. Did you have a chance to observe the quality of service rendered by Foster Transfer Company?

A. I did on several occasions.

Q. I didn't get the last part.

A. I did on several occasions.

Q. And tell us, if you will, what your observations were as to the quality and the character of the service rendered.

A. From my experience it had been very satisfactory.

Q. Did you have any complaints at all?

A. No.

Q. Were you familiar and did you have any contact with the move from Wallingford which has been testified to here?

A. I was asked to go with Mr. Clark and survey and give him my ideas as to what would be necessary in handling the move, the amount of equipment and the number of hours that would be required

(Testimony of Clarence Browne.)
to do it, and the number of men; just in an advisory capacity.

Q. Who asked you to do that?

A. I don't remember. I think it was Mr. Clark.

Q. And did you do that? [304] A. I did.

Q. Did you form an opinion based on your experience as to what equipment was necessary and what time would be required to make the move?

A. I did.

Q. Did you observe the performance of that job for any time?

A. No, only on the start. I did some when they moved the other part of it—not the Wallingford part.

Q. Which part is that?

A. That was the one where they moved from 8th and Lenora—that part that was stored in the basement.

Q. You said you observed the start. How much of that did you observe?

A. Oh, about the first day, I would say.

Q. And how much of the Lenora move did you observe?

A. Well, I watched that almost—intermittently until it was finished.

Q. Over what period of time did that extend?

A. I don't recall.

Q. Can you give us any approximation?

A. It would just be a guess. I think it was around probably 10 or more days.

(Testimony of Clarence Browne.)

Q. And from what you observed, what can you tell us as to the quality of the work done by Foster Transfer in handling those moves? [305]

A. From what I saw, I would think it was average.

Q. How did their service compare with other trucking companies with which you had dealings?

A. They were—their service was better in this respect, that they could give us more prompt service than the others. Aside from that, the handling and all would be the same.

Mr. Seering: You may examine.

Cross-Examination

By Mr. Evans:

Q. In what capacity were you working at the time that you were observing this move?

A. I had been asked to confer with Mr. Clark.

Q. Who asked you? A. Mr. Clark.

Q. Who were you working for?

A. I was working under Mr. Ihlanfeldt's Lend Lease operation, but I was quite frequently called on matters of transportation—even though it was in another department.

Q. And, as I understand, you did not work in the same department that Mr. Street worked in?

A. That is right.

Q. That is right, you didn't, or that is right, you did? A. I did not work for Mr. Street.

Q. How much interest did you have in the Foster Transfer [306] Company? A. None.

(Testimony of Clarence Browne.)

Q. At any time have you had any interest?

A. None.

Q. Or in any of the Doolittle operations?

A. None.

Q. Who are you working for now?

A. Myself.

Q. I understood that you were a salesman.

A. I have a water proofing material.

Q. Well, do you have a store or a business or do you manufacture?

A. Yes, at 2705 1st Avenue, under the name of Cretite Sales, Incorporated.

Q. You are the proprietor of that business?

A. Yes, sir.

Q. What was your estimate as to how long this job should take?

A. If certain conditions were met, it could have been done approximately in seven or eight days.

The Court: You should keep your voice raised, Mr. Browne. Sometimes it falls so that I do not distinctly understand every word you speak.

Mr. Evans: I did not hear that last answer.

(The last answer was repeated by the reporter.) [307]

The Court: Which job now are you referring to?

The Witness: The Wallingford job.

Q. (By Mr. Evans): How long in your estimation would it have taken to perform the Lenora Street move—from Lenora Street down to 1st Avenue? A. About the same.

Mr. Evans: No further questions.

(Testimony of Clarence Browne.)

Redirect Examination

By Mr. Seering:

Q. What were those conditions?

A. That if they could keep the material flowing to the warehouse in which they were moving so that they could shuttle the trucks, they could accomplish the job within that time.

Q. And whose responsibility was that—keeping the material flowing?

A. I don't know that. I just merely suggested that if they had a certain amount of men, and I was not concerned with whose men they were.

Q. Now, were you familiar with the question as to whether this job was held up by weather or by an elevator failure?

A. I did hear that they had some elevator trouble which slowed them up.

Q. What about the weather? [308]

A. I don't recall.

Mr. Seering: That is all.

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Seering: I call Mr. Hallam.

S. W. HALLAM

a pervious witness for the plaintiff, and having been previously sworn, resumed the stand and testified further as follows:

(Testimony of S. W. Hallam.)

Direct Examination

By Mr. Seering:

Q. Mr. Hallam, did you have any experience with the demurrage incident that has been referred to? A. No, sir.

Q. Did you have any experience with the actual moving of the paper—the shipment of paper?

A. Yes, sir.

Q. What were the facts in regard to that?

A. The facts were that we went out to move the paper and we arrived at the car and the paper was all sealed in a big hardwood box—about half the car was sealed and banded—and after we broke into this hardwood box, why, the paper was all in small packages and that was why it took so long [309] to handle.

Q. And did you work overtime to get that out?

A. We worked overtime but didn't charge overtime.

Q. Now, on these work slips on the Wallingford job particularly, what is the situation as to government representatives signing those slips? What is the practice?

A. Well, the practice on all hauling, whenever a truck driver delivers anything he has to have a signature to show that he has done that, and in certain cases it is a receipt for the merchandise; and on a job requiring time, that is, based on time, it is authentication of the time—that is not only for the government, but for everybody.

(Testimony of S. W. Hallam.)

Q. It is for your own record?

A. Yes, to stop the trucking company from just writing out bills promiscuously.

Q. Now, have you checked your records to ascertain as well as you can the length of time consumed on the Wallingford job and that other one?

A. As well as I could; yes, sir.

Q. And what was the time as well as you can ascertain from your records?

A. I find we took 27 days for both jobs.

Q. Break that down.

A. Well, part of the time we were working on the Wallingford job we were also working on the 8th and Lenora job, as [310] our records show.

Q. How long did the Wallingford job take?

A. I would say about 13 days.

Q. Now, what was the fact with regard to whether the job was held up by weather?

A. It is my recollection—now, whether I am right or not I don't know—but it is my recollection I talked with Mr. Street just prior to Christmas when we had two very bad days of weather and that we agreed we wouldn't work those two days.

Q. What is the fact with regard to the performance of the elevator?

A. That I don't know for sure because I wasn't there.

Q. Now, referring to the incidents that have been cited here by the witnesses for the government, taking them in order, the incident testified to by Mr. Mac-

(Testimony of S. W. Hallam.)

Innes of the damage done at the apartment by your men, what do you know about that?

A. That is correct.

Q. And what was done by you about it?

A. I went out to Mr. MacInnes and settled the claim.

Q. From your experience with the company for which you are presently employed, and your experience with Foster Transfer Company, can you say, is that a happening of some frequency? [311]

A. That is not an uncommon occurrence.

Q. Now, do you recall the incident testified to by Mr. Schwandt of the Japanese incident—about the trucks and helpers?

A. I recall his testimony, yes.

Q. Do you, yourself, recall the incident?

A. No, sir.

Q. Do you recall the incident of the shelves from Auburn? A. No, sir.

Q. You had no contact with that. To shorten this, are there any other matters brought up here in the testimony which I haven't asked you about or which you wish to explain?

A. I can't think of any.

Mr. Seering: You may examine.

Cross-Examination

By Mr. Evans:

Q. Mr. Hallam, do I understand that it is a common practice among transfer companies to drag boxes down stairs rather than carry them down?

(Testimony of S. W. Hallam.)

A. I didn't say it was a common practice. I said it isn't uncommon for them to do it. I mean it does happen.

Q. Is it in accordance with what would be considered proper handling? A. No, sir, it isn't.

Mr. Evans: No further questions.

(Witness excused.)

Mr. Seering: Plaintiff rests.

The Court: Any further evidence on the part of the defendant?

Mr. Evans: No further evidence.

May I ask at this time that the witnesses be excused?

The Court: All the witnesses are excused.

Now, obviously we haven't time this afternoon to hear any substantial amount of argument and counsel doubtless want to argue this case in a manner that is agreeable to them. We will have to arrange some other time to do it because I do not feel disposed to delay the trial that is scheduled to begin tomorrow. Is there any reason why counsel could not appear before the Court sometime Friday and argue this case?

(Argument of counsel.)

The Court: Counsel in this case are excused until 11:00 o'clock Friday morning.

(At 4:15 o'clock p.m., Wednesday, August 3, 1949, the above entitled cause and proceedings was adjourned to 11:00 a.m., Friday, August 5, 1949, at which time further proceedings were had as follows:) [313]

August 5, 1949, 11:00 o'Clock a.m.

(Oral argument was then submitted by respective counsel for plaintiff and defendant.)

COURT'S DECISION

The Court: If in this case there was involved the work only of the witness, L. H. Doolittle, and his conduct of his company's performance of this contract here involved, the Court would find it almost impossible to conclude that he did or omitted to do any act which tended to breach this contract but, unfortunately for the plaintiff, there is involved in addition to that person's services the services and work of other persons who were employees of the plaintiff company.

I will not attempt to name them, but the evidence, and a preponderance thereof, clearly convinces the Court, and the Court finds, concludes and decides that there was not reasonable work done under this contract on the part of the plaintiff corporation or organization and that as a result of the lack, in some instances, of faithful performance of the work assigned to plaintiff under this contract [314] in respect to the services of various ones of the plaintiff's employees, that the defendant had the right for some time before the contract was terminated

to terminate the contract upon the giving of reasonable notice, but that the notice given by the defendant to the plaintiff of intention to terminate the contract, or as to the effective date of the termination, was not reasonable and that the notification given by defendant to plaintiff of cancellation was unreasonable on the defendant's part and that as a result of such unreasonableness the plaintiff reasonably sustained expenses in the total sum of $1500 on account of truck lease expense, warehouse rental and stenographer salaries, for which sum plaintiff is entitled to recover against the defendant in this action.

The case is continued to August 15th, at 10:00 o'clock in the forenoon for the purposes mentioned by the Court. Those connected with the case are excused until that time.

> (At 12:30 o'clock p.m., Friday, August 5, 1949, the above entitled and numbered cause was adjourned to 10:00 o'Clock a.m., August 15, 1949, at which time further proceedings were had as follows:) [315]

CERTIFICATE

I, Bernard Ayres, do hereby certify that I was the official court reporter for the above entitled court between August 1, 1949, and August 6, 1949, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a

true and correct record of the matters as therein set forth.

/s/ BERNARD AYRES,
Court Reporter.

August 15, 1949, 10:00 a.m.

The Court: According to my information there is to come regularly before the court at this time the matter of settling and entering the findings of fact and conclusions of law and judgment in the case of Foster Transfer Company against the United States. Are the parties ready?

Mr. Seering: They are.

The Court: If you have papers which you have approved as to form, you may come forward. If there is to be a contest, I will hear it.

Mr. Seering: I have served those on counsel.

The Court: Come forward, Mr. Evans, if you wish to make a statement.

Mr. Evans: I might say, Your Honor, that the findings of fact and conclusions of law are identical, except for the last two paragraphs. Paragraph VI in the one I have prepared is in addition to what counsel prepared in his findings of fact, and the itemization in Paragraph VII is in addition to counsel's prepared findings of fact. Except for that, I copied his.

The Court: Paragraph VII. What is the detail there that you did in addition to his? [317]

Mr. Evans: The one which counsel prepared had a period after some fifteen hundred dollars. That

which follows, the figures $1,500.00, is added in the one which I prepared itemizing what the fifteen hundred dollars amounted to.

The Court: There is a detail connected with that matter which I would like to explain and which may not be exactly as stated, although that was part of the court's rationalization in the matter. It was upon consideration inspired by those items that the court did award the fifteen hundred dollars. The basis of recovery was not to coincide specifically with those items, but by reason of those things the court thought that that sum was just.

Mr. Seering: That was the reason I used this language in Paragraph VI: "that these expenses consisted of trucks and warehouse leased by plaintiff and salaries of office employees whose services will no longer be necessary after the cancellation of the contract" without itemizing them specifically. I so understood in your oral decision that no specific figure was used.

The Court: Responding now to Government counsel's request as to paragraph numbered VI in the Government's for, I would say that this is a more accurate statement, a more complete statement, with the condition to be stated to this effect: 'upon giving reasonable [318] notice thereof'; but in this case no notice of any kind was given. I believe that would be sufficient.

Mr. Evans: Those are words which the court believes should be added?

The Court: If I should adopt that number VI

or anything in substance amounting to something of that kind, I would feel certain that some such statement as I last indicated would be appropriate and would make the finding more suitable than it now is.

Mr. Seering: Has Your Honor read Paragraph VI in my proposed form?

The Court: I have not.

Mr. Seering: I was just wondering whether that met Your Honor's requirement in that particular.

The Court: I don't recall from the evidence that any specific notice was given. What do counsel recall?

Mr. Seering: A letter was mailed on the 20th and received on the 21st and effective on the 28th.

The Court: Effective on the 28th?

Mr. Seering: Yes.

The Court: Considering that further, and the provisions in it specially mentioned by counsel in the two respective forms, namely, the form requested by plaintiff and the form or forms requested by defendant, the court thinks that the form in those specially requested by [319] plaintiff is more in keeping with the court's decision and does carry into effect the court's opinion and decision as finally made.

My reason for thinking that, gentlemen, is that I am positive that if this litigation were pending between private persons exclusively as distinguished from being litigation pending between the Government and a private individual, this court and other

courts would feel that this notice under the contract provisions here involved introduced a hardship and expense upon the plaintiff not justified by virtue of any right under the contract possessed by the party terminating the contract. I do not know of any reason why a different rule applies to the Government in a case where it is a party as distinguished from a case involving only private parties; so the court adopts the findings and conclusions proposed by the plaintiff in this case.

Mr. Evans: In order to take an exception, Your Honor, it is my understanding that the rules require that a person taking the exception make known to the court the reason for the exception, and at this time, for the purpose of the record, I would like to do that.

The Court: I do not think that the defendant is right, and I think that what I have said sufficiently covers any right in that direction which the losing party [320] might have. The record will show the court's statement of reasons.

Mr. Evans: What I mean is, in order for me to properly take an exception I understand it is my duty to make known to the court the reason for my exceptions. I don't want to burden the court.

The Court: If you wish to make any further statement of reasons for exceptions, Mr. Evans, without being authorized by the court to make an argument, you may feel free to make a statement for the record, if you feel a statement is needed.

Mr. Evans: The defendant excepts to the find-

ings of fact and conclusions of law just entered for the reason that the same are not supported by the evidence; that the findings of fact and conclusions of law are contrary to law in that they vary the terms of a written contract.

The Court: Exceptions allowed.

Would you, Mr. Evans, like the court to note on your requested form the fact that they have been presented on this form and that the court declines to enter them?

Mr. Evans: I don't believe that is necessary. I really have very little dispute with opposing counsel's.

The Court: Does anyone know what the costs are properly taxable in this case?

Mr. Seering: I'll see if we can agree on them, Your Honor.

The Court: See if you can.

Mr. Seering: $43.80.

Mr. Evans: That is agreed.

The Court: Do counsel on both sides agree that under the statute it is within the court's discretion to award costs taxable in this case?

Mr. Seering: Yes.

The Court: Will you advise the court of the items which you have considered in arriving at that estimate?

Mr. Seering: $15.00 filing fee, $20.00 attorney fee and $8.80 witness fee for four witnesses.

The Court: At how much?

Mr. Seering: I understand it is $2.20. I'm not advised as to the correct figure.

The Court: $2.20. Four would be $8.80.

Mr. Seering: Counsel draws my attention to the fact that witness fees have gone up to $4.00 daily. That would make $16.00.

The Court: $51.00, instead of the other figure. See if you agree.

Mr. Seering: That is correct. [322]

The Court: $51.80.

Let this judgment be now entered in that case, and in that case counsel are excused. [323]

CERTIFICATE

I, Joseph R. Wheeling, do hereby certify that I was the official court reporter for the above-entitled court between August 8, 1949 and August 20, 1949, and as such was in attendance upon the hearing of the foregoing matter. I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JOSEPH R. WHEELING.

[Endorsed]: Filed November 14, 1949. [324]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(O) of the Federal Rules of Civil Procedure, I am transmitting herewith pursuant to designation of counsel, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings, together with Plaintiff's exhibits numbered 1 to 8, inclusive, and Defendant's exhibits numbered A-1 to A-13, inclusive, offered in evidence at the trial of said cause constitute the record on appeal from the Judgment for Plaintiff filed August 15, 1949, and entered August 16, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Complaint
2. Summons and Marshal's Return
3. Affidavit of Mailing
4. Appearance for Defendant
5. Answer of Defendant
6. Reply of Plaintiff
7. Praecipe for Subpoena (J. J. Walsh)
8. Defendant's Memorandum of Authorities
9. Marshal's Return on Subpoena (J. J. Walsh)
10. Findings of Fact and Conclusion of Law
11. Judgment (Filed August 15, 1949)

11a. Marshal's Return on Subpoena (Hallan and 2)

12. Defendant's Notice of Appeal

13. Stipulation releasing file and exhibits to Court Reporter for 20 days

14. Order releasing file and exhibits to Court Reporter

15. Court Reporter's Transcript of Testimony and Proceedings

16. Statement of Points Relied Upon by Defendant

17. Designation of Record on Appeal

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 15th day of November, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12401. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Foster Transfer Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12401

UNITED STATES OF AMERICA,
Appellant,

vs.

FOSTER TRANSFER COMPANY, a Washington corporation,
Appellee.

STATEMENT OF POINTS RELIED UPON

Appellant, United States of America, proposes on its appeal to the United States Court of Appeals for the Ninth Circuit to rely upon the following points as error:

1. The court erred in finding, concluding and adjudging that the terms of the written contract between the appellant and the appellee required the appellant to give the appellee notice of cancellation of the contract a reasonable time before the effective date of such cancellation.

2. The court erred in finding, concluding and adjudging that the period of time between the giving of the notice of cancellation of the contract by the appellant and the effective date of the cancellation was unreasonable.

3. The court erred in questioning witnesses on issues not raised by the pleadings or evidence, introduced by the parties and granting the appellee damages based on such testimony so adduced.

4. The court erred in finding, concluding and adjudging that the appellee recover damages against the appellant for items not mentioned in the pleadings nor raised by evidence offered by the parties.

5. The weight of the evidence is contrary to the findings of fact.

6. The conclusions of law are contrary to the law governing the subject matter of the controversy.

7. The court erred in refusing to admit appellant's Exhibit A-8 in evidence.

8. The court erred in holding the appellee was entitled to judgment against the appellant.

9. The court erred in not finding in favor of the appellant.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ VAUGHN E. EVANS,
Asst. U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed November 17, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes now the appellant, United States of America, and designates the following as the record to be prepared on appeal in the above entitled cause:

1. The entire transcript of proceedings.
2. All pleadings.
3. Exhibits 5, 6, A-1, A-2, A-6, A-7, A-8, A-10, A-11, A-12 and A-13.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ VAUGHN E. EVANS,
Asst. U. S. Attorney,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 17, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby Agreed and Stipulated by and between the parties to the above entitled appeal by and through their respective counsel of record that exhibit A-6 admitted in evidence in the District Court contains true and complete copies of exhibits 1, 2, 3, 4, A-3, A-4, A-5 and A-9, and therefore said exhibits last mentioned may be omitted from the record on appeal but that the copies of the same contained in exhibit A-6 may be considered by the court in lieu thereof.

It is Further Agreed and Stipulated that the exhibits so omitted from the record will be found on the corresponding numbered pages in exhibit A-6 as follows:

Exhibit Number	Page in Exhibit A-6
1	24
2	13
3	6
4 (4 documents)	51, 48, 49, 43
A-3	15
A-4	36
A-5	38
A-9	34

Dated at Seattle, Washington this 15th day of November, 1949.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ VAUGHN E. EVANS,
Asst. U. S. Attorney,
Attorneys for Appellant.

/s/HAROLD A. SEERING,
Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges.

[Endorsed]: Filed November 17, 1949.

In the United States Court of Appeals
for the Ninth Circuit

No. 12401

UNITED STATES OF AMERICA,
Appellant,

vs.

FOSTER TRANSFER COMPANY, a Washington corporation,
Appellee.

ORDER RE ORIGINAL EXHIBITS

This matter having come on on application of the appellant for permission to have the Court consider all the exhibits in the above entitled appeal in their original form and the parties to said appeal having

consented to such procedure by stipulation filed herein, it is hereby,

Ordered, Adjudged and Decreed that all of the exhibits now on file with the Clerk of this Court may be considered by the Court in their original form without the same being printed in the record.

Done this 11th day of January, 1950.

/s/ WILLIAM DENMAN,
Judge.

/s/ WILLIAM HEALY,
/s/ HOMER BONE,
Judges U. S. Court of Appeals
for the Ninth Circuit.

The Appellee hereby consents to the entry of the foregoing order.

MAXWELL, SEERING,
JONES & MERRITT,

By /s/ R. W. MAXWELL,
Counsel for Appellee.

No. 12401

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FOSTER TRANSFER COMPANY,
a corporation,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

FILED

MAR 1 - 1950

PAUL P. O'BRIEN,
CL

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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No. 12401

IN THE

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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No. 12401

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FOSTER TRANSFER COMPANY,
a corporation,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the United States District Court is set out in Paragraph I of the appellee's complaint which reads as follows:

> "This action arises under the Act of Congress of March 3, 1887, C. 359, 24 Stat. 505; U.S.C.

> Title 28, Section 41(20). That the action is one upon an express contract and the amount in controversy does not exceed Ten Thousand ($10,-000.00) Dollars, as hereinafter more fully appears." (T.R. 2).

Paragraph I of the appellee's complaint is admitted in Paragraph I of the appellant's answer. (T.R. 7). For jurisdiction of this court to review the decision of the District Court, see 28 U.S.C. 1291.

STATEMENT OF THE CASE

On June 26, 1945, the United States Treasury Department, Procurement Division, entered into a written contract with the Foster Transfer Company, a Washington corporation, appellee herein, wherein the appellee agreed to perform drayage, and packing and crating services for the appellant in accordance with the terms of the contract. Plaintiff's Exhibit 1 is a copy of the contract and a copy of the same will also be found beginning on page 24 of Exhibit A-6. Section 21 of the Special Conditions of said contract provides:

> "The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause."

Paragraph 3 of the General Provisions of the contract provides:

> "3. *Disputes*—Except as otherwise specifi-

> cally provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

The contract further provided on the first page thereof, that the appellee will furnish—

> "Drayage, packing and crating of supplies, equipment, furniture and household goods in Seattle, Washington, as may be required by the Procurement Division, U. S. Treasury Department, Seattle, Washington, and such other Government activities in the City of Seattle, as may desire to procure under this contract during the fiscal year beginning July 1, 1945 and ending June 30, 1946."

The appellee began performing under the contract on July 1, 1945. During the remaining months in the year 1945, the Treasury Department received complaints to the effect that the appellee was not performing satisfactory services required under the contract. On August 28, 1945, a conference was held between representatives of the Treasury Department and the appellee corporation, during which the appellee's unsatisfactory performance of the contract was discussed. On the same day a letter was transmitted from the Treasury Department to the appellee cor-

poration confirming this conference. (Ex. A-4, Ex. A-6, page 36 and Appendix I). On September 26, 1945, another such conference was held which was likewise confirmed by letter of same date (Ex. A-5, Ex. A-6, page 38, Appendix II).

Thereafter, the appellee continued to perform unsatisfactory services under the contract. From time to time the appellee's attention was directed to these matters orally by representatives of the appellant. On February 20, 1946, the appellee was notified by letter that the Government was exercising its rights of concellation effective as of the close of business February 28, 1946. (Ex. 2, Ex. A-6, page 13, Appendix III). In accordance with the letter of cancellation, the appellee performed no further services under the contract after February 28, 1946.

By letter dated February 25, 1946, the law firm of Maxwell and Seering, representing the appellee, made inquiry as to the reasons for the cancellation of the contract and the procedure to appeal under provision 3 of the General Provisions. (See page 14 of Ex. 6-A). By letter dated February 28, 1946, (Ex. A-3, page 15 of Ex. A-6, Appendix IV) the appellant advised the law firm of Maxwell and Seering of the reasons for the cancellation of the contract. On March 8, 1946, the appellee filed an appeal with the

Secretary of the Treasury under General Provision 3 of the contract. (Ex. A-6, page 6 and following). By letter dated July 11, 1946, the Secretary of the Treasury considered the appellee's appeal and sustained the action of the Contracting Officer in cancelling the contract. (Exhibit A-6, page 1, and Appendix V).

The appellee brought this action alleging it had fully and faithfully performed all things required under the provisions of the contract and that the U. S. Treasury Department had wrongfully, arbitrarily and without cause, canceled said contract, and that as a result thereof, appellee had been deprived of its profits for the unexpired portion of the term of the contract in the sum of Five Thousand ($5,000.00) Dollars. (T.R. 2, 3 and 4). The complaint does not in any wise mention or infer any special damage other than loss of profits.

The appellant in its answer admitted the existence of the contract and that the court had jurisdiction but denied all other allegations of the complaint. By affirmative defense the appellant alleged (1) that the appellee had filed an appeal under the provisions of the contract and the cancellation of the contract had been sustained by the Secretary of the Treasury; (2) that the said contract was canceled for good and sufficient cause, and (3) that the appellee

had not fully and faithfully conformed and complied with the provisions of said contract. The sole issues of fact as framed by the pleadings were (1) whether or not the appellant had good and sufficient cause to cancel the contract and (2) if not, how much profits the appellee had lost.

During the course of the trial while Mr. L. H. Doolittle, President of the appellee corporation, was testifying, the trial Judge interrupted the examination of the witness to inquire as to whether or not the appellee corporation had committed itself to any expenses which could not be terminated within the time allowed between the receipt of the notice of cancellation and the effective date of cancellation. This interrogation is set out on pages 62, 63, 64 and 65 of the Transcript of Record. In response to the interrogation by the trial Judge, the witness listed some $1,675.00 in such expenses. This was the only testimony adduced at the trial in regard to such expenses. All of such testimony was elicited from the witness by the trial Judge and none of the same was elicited by counsel on either side. The subject of special damages such as fixed expenses was not raised anywhere in the pleadings, the appellee having brought the action to recover loss of profits only.

The trial Court in its oral decision (T.R. 295

and 296) and in the written findings of fact (T.R. 12, 13, and 14) found that the appellee had not faithfully performed the services under the contract and that the appellant had just cause for canceling the contract.

The court then found that the notice given was not reasonable in that it did not give the appellee sufficient time to terminate his fixed expenses and awarded judgment in favor of the appellee in the sum of $1500.00 to cover such fixed expenses.

QUESTIONS RAISED

1. Can the court under the guise of interpretation, insert in a written contract a provision that the party exercising an express, unequivocal right of cancellation at any time must give the other party sufficient time to terminate his fixed expenses before the effective date of such cancellation?

2. When the evidence adduced by the parties is confined strictly to the issues framed by the pleadings, can the trial judge interrogate witnesses on other issues and decide the case solely on such other evidence?

3. When the plaintiff's complaint seeks recovery only for loss of profits and presents evidence only on such issues as are set out in the pleadings, can the

trial judge interrogate witnesses with regard to special damages and allow recovery on such special damage?

4. When by the terms of a contract it is provided that disputes concerning questions of fact shall be decided by the appellant's contracting officer subject to appeal to the Secretary of Treasury whose decision shall be conclusive, and the contracting officer determined that the services performed by the appellee are not satisfactory, and upon appeal taken by the appellee from such decision, the Secretary of the Treasury sustained the decision of the contracting officer, can the court impeach such a decision when no fraud, gross mistake or bad faith is present?

SPECIFICATIONS OF ERROR

1. The Court erred in finding that the contract required the appellant to give the appellee a sufficient time between the date of notification of cancellation of the contract and the effective date of such cancellation to terminate all fixed expenses.

2. The Court erred in questioning the witness L. H. Doolittle upon an issue of special damages not raised by the pleadings nor relied upon by either party.

3. The Court erred in allowing the appellee to

recover damages against the appellant for the special damages set out in Finding No. VI when the right to recover such special damages was not raised in the pleadings nor by any evidence, other than that elicited from the witness, L. H. Doolittle, by the Court.

4. The Court erred in impeaching the decision of the Secretary of the Treasury when the terms of the contract provided that such decision would be final and conclusive as to the parties.

ARGUMENT

1. Argument on Specification of Error No. 1

SUMMARY

In Specification of Error No. 1 it is the appellant's contention that the provisions in the contract stating "21. The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause." clearly and unequivocally expresses the intention of the parties and needs no interpretation. The trial Court's finding that the appellant was bound to give the appellee a reasonable time to terminate his fixed expenses before the effective date of cancellation is in fact inserting terms in the contract which the parties never intended. Such an interpretation utterly destroys the clear, unequivocal language of the contract, "at any time",

and places in the contract a provision to the effect that the appellant indemnifies the appellee against any and all loss which he may suffer by virtue of the appellant exercising the unequivocal right to cancel. The terms of the contract will permit no such interpretation.

ARGUMENT

The contract provides in Special Condition No. 21 "The Government reserves the right to cancel at any time for what may be deemed good and sufficient cause." The Court determined in the oral decision (T.R. 295) and in the findings of fact (T.R. 12) that the appellee had not faithfully performed the services required under the contract and the appellant had good and sufficient cause to cancel the contract under the terms of the above quoted condition No. 21. This finding of fact conclusively decides all issues of the case. The appellant having exercised the lawful right to cancel, the appellee is not therefore entitled to recover any damages.

However, the Court further decided the notice of cancellation given on February 20, 1946 (Appendix III) and received by the appellee on February 21, 1946, fixing the effective time of cancellation as of the close of business on February 28, 1946, was unreasonable. Such an interpretation is in fact re-

writing the contract for the parties. This ruling removes the words "at any time" and inserts in place thereof the words "upon giving reasonable notice." If the parties had wanted these words in the contract, they would have used them.

There are few principles of law more clearly settled in all jurisdictions than the doctrine that a court cannot rewrite a contract which the parties have made for themselves.

The contract was made in the State of Washinton and was to be performed in the State of Washington, therefore, both the law of that state as well as the Federal law will be quoted herein. The decisions of the Supreme Court of the State of Washington have steadfastly held to the well-settled principle of law which is quoted in the case of *Minder v. Rowley*, (decided November 7, 1949), 135 Wn. Dec. 86. In that decision on pages 88 and 89 it is stated:

> "The evidence produced at the trial of this case does not throw light upon the meaning to be given the word "proceeds"; therefore, we must give to it, as did the trial court, its usual meaning.
>
> This conclusion, it is true, leaves appellants in an unenviable position, but the courts cannot aid them. Appellant, Harry M. Case, entered into the contract, and it was not tainted by fraud or misunderstanding, hence he must abide its consequences.

The rule which must be applied was stated by Judge Dunbar as follows in *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899:

'We are convinced that as long as people are privileged under the law to make contracts for themselves, if they are unwise enough to make contracts which are burdensome, the law cannot relieve them . . .

'They solemnly executed this contract, and in the absence of fraud it is conclusively presumed to speak the minds of the contracting parties. Any other construction would destroy the force and effect of all written obligations and leave everything to the chance of slippery memory, the very thing which a written contract is intended to guard against'."

In *Merlin v. Rodine*, 132 Wn. Dec. 734 (decided March 15, 1949), the Court further emphasized this principle in the following language:

"That the parol evidence admitted by the trial court did vary the terms of the written contract seems patent; and that it did not come within any of the recognized exceptions to the parol evidence rule is equally clear. We have consistently held that we cannot, upon general considerations of abstract justice, make a contract for the parties that they did not make for themselves. *Chaffee v. Chaffee*, 19 Wn. (2d) 607, 145 P. (2d) 244, and cases therein cited.

The respondents seek to justify the admission of the parol evidence on the basis of certain rules of construction. There is, however, no ambiguity or uncertainty in the contract as written, and consequently there is no basis for a resort to any of the rules of construction relied upon."

In the case at hand there was not one word of evidence either oral or written which would support the Court's finding that the parties ever intended that the appellant was ever required to give the appellee a reasonable time after notice of cancellation to terminate his fixed expenses.

In *Chaffee v. Chaffee*, 19 Wn. (2d) 607, the Supreme Court of the State of Washington stated, beginning on page 625:

> "It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. The expressions of the various courts on the subject are tersely stated in 12 Am. Jur. 749, Contracts, Sec. 228, as follows:
>
> 'Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties — that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of public policy and contains no ele-

ment of ambiguity, the courts have no right, by a process of interpretation, to relieve one of them from disadvantageous terms which he has actually made.'

See, also, 17 C.J.S. 702, Contracts, Sec. 296.

This court has frequently made similar statements of the law. In *Collins v. Northwest Cas. Co.*, 180 Wash. 347, 39P. (2d) 986, 97 A.L.R. 1235 we said:

'We are not permitted, upon general considerations of abstract justice, or in the application of the rule of liberal construction, to make a contract for the parties that they did not make themselves, or to impose upon one party to a contract an obligation not assumed.'

To the same effect, see *Hays v. Bashor*, 108 Wash. 491, 185 Pac. 814: *Johnson v. McGilchrist*, 174 Wash. 178, 24 P. (2d) 607; *Thomle v. Soundview Pulp Co.*, 181 Wash. 1, 42 P. (2d) 19; *Peabody v. Star Sand Co.*, 186 Wash. 91, 56 P. (2d) 1018."

In the case of *United States v. Moorman*, decided by the United States Supreme Court on January 9, 1950, case No. 97 (not yet printed in bound volumes), the principles announced by the Supreme Court of the State of Washington as above quoted are followed. This case will be more fully discussed under Specification of Error No. 4.

The decisions of the United States Supreme Court and the Courts of Appeals are in accord with the

decisions of the Supreme Court of the State of Washington.

In *Douglass v. Douglass*, 22 L.Ed. 479, 21 Wall. 98, the Supreme Court of the United States stated:

> "We cannot interpolate what the contract does not contain. Our duty is to execute it as we find it, and not to make a new one."

In *Sheets v. Selden*, 19 L.Ed. 166, 7 Wall. 416, the Court stated:

> "This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them."

In *Shell Oil Co. v. Manley Oil Corporation*, 124 F. (2d) 714, the Court stated on page 715:

> "Courts are not authorized to make contracts for the parties, but must construe them as written, and where plain, common words are used in their ordinary meaning, they must be accepted in that sense."
>
> (Cert. denied 316 U.S. 690, 86 L.Ed. 1761)

In *City of Philadelphia v. Lieberman*, 112 F. (2d) 424 the Court stated on page 429:

> "We cannot rewrite the agreement of the parties but must take it as they have written it." (Cert. denied 311 U.S. 679, 85 L.Ed. 438)

Numerous other cases within the Federal Jurisdiction may be found under Contracts in the Federal Digest under Section 143(b).

It should be here pointed out that the basic finding made by the Court in both the oral decision and the written findings of fact is that the Government had just cause for cancelling the contract. The finding that the contractor is entitled to recovery is inconsistent with that basic finding and cannot stand.

The fallacy of the trial Court's reasoning, that the appellant in its notice of cancellation must allow the appellee time to terminate its fixed expenses, becomes increasingly clear when the evidence upon which the amount of damages was determined is considered. (T.R. 62, 63, 64, and 65). Upon the Court's interrogation, the witness, Doolittle, testified that his fixed expenses were (1) rental on four trucks at $250.00 apiece for one month, total $1,000, (2) rental on a warehouse for 3 months at $75.00 per month, total $225.00, and (3) wages for two girls for one month, total $450.00.

Under the Court's reasoning, if the appellant had defaulted in the performance of his contract during the first month of the one-year term of the contract, and the appellant had rented the warehouse and trucks by the year and had likewise hired his help by the year, then the appellee would be bound to pay all of these expenses for 11 months. Thus the appellant is required to indemnify the appellee against

any and all loss by virtue of the contract. Such was never the intention of the parties as expressed by the plain, unequivocal terms of the contract. Such burdens cannot be imposed upon a party to the contract under the guise of interpretation.

Attention is called to the fact that one of the obvious purposes of a cancellation clause such as existed in this contract is to keep a constant pressure on the contractor to be punctilious in the performance of his obligations. It would be inequitable to the Government, which has inserted this clause for this very purpose, to deprive it of the benefits and protection of the clause by wholly relieving the contractor from any of the financial loss which might fall upon him solely because of his own failures in performance. It may be also added that there is no inequity toward the contractor where he has deliberately entered into commitments which would be embarrassing to him if, and only if, he fails to live up to his obligations.

The ruling of the trial judge cannot be sustained under the pretense of justice under the doctrines of equity. The president of the appellee corporation testified that his company made $13,421.00 profit out of the contract during the 8 months it was in force (T.R. 38). Certainly, a loss of $1,500.00 due entirely

to the appellee's failure to faithfully perform the services required under the contract, after repeated warnings, is not shocking to anyone's conscience. To hold the appellant liable for any and all loss which the appellee might suffer in spite of such profits, is without justification. The ruling of the trial Judge must be reversed and judgment entered for the appellant.

2. Argument on Specifications of Error 2 and 3.

SUMMARY

The Court erred in interrogating the witness Doolittle on issues of fact not pleaded nor relied upon by either party. In so doing the Court injected into the case issues neither party was prepared to meet. Trial judges are not permitted to create and decide issues which neither party has contemplated. In so doing the trial judge in effect violated the parol evidence rule which is a rule of substantive law in the State of Washington rather than a rule of procedure.

ARGUMENT

Since specifications of error 2 and 3 are directed to the errors of the trial court in interrogating a witness on issues not raised by the pleadings, those two specifications will be argued together.

The appellee's complaint alleges that the appellee was deprived of $5,000.00 in loss of profits and the prayer of the complaint asks for that amount only. There is no mention in the allegations of the complaint of any special damages such as expenses incurred for the purpose of fulfilling the contract nor does the prayer thereof ask for any other or further relief.

Nowhere in the pleadings, argument or evidence adduced by the parties through their counsel is there any mention of special damages as above mentioned. The only mention of such expenses is found in the answers to questions propounded at the trial by the trial judge to the witness Doolittle. (T.R. 63, 64, 65). Upon this evidence and this evidence alone, the trial judge allowed a recovery to the appellee. It is the appellant's contention that the interrogation of the witness Doolittle by the trial judge on the subject of special damages was clearly erroneous. It is further the appellant's contention that the court erred in allowing a recovery on the special damages not mentioned in the pleadings nor relied upon by the appellant.

Rule 9g of the Federal Rules of Civil Procedure provides:

> "When items of special damages are claimed, they shall be specifically stated."

This rule is a restatement of the law as it existed before the rule was promulgated. The following quotations from 25 Corpus Juris Secundum explain the reasons for the rule. Section 130, 25, C.J.S. at page 745:

> "Plaintiff's initial pleading in an action for damages must state facts sufficient to constitute a cause of action, show that plaintiff has been damaged by reason of the wrongful acts complained of, and how he was damaged; and it must ordinarily set out the amount of damages sustained in definite amount, or afford a basis upon which damages may be estimated, and otherwise show right of recovery. The necessary elements must be alleged so that defendant may be prepared to meet them, and defendant is entitled to know from the declaration the character of the injury for which he must answer. * * *."

Section 131, 25 C.J.S. at page 753:

> "Only the damages which are the necessary result of the acts complained of can be recovered under a plea of general damages. Hence, it is generally held that special damages, which are the natural but not necessary result of the wrongful acts or injury, must be particularly averred in the complaint to warrant proof of or recovery therefor, except where such damages are conclusively presumed from the facts stated. This is true whether they result from tort or breach of contract, and the rule applies in equity as well as at law. It follows that any attempt to introduce evidence of such damages under a general averment of damages is a fatal variance between the pleadings and proof, and is therefore not permissible, although proof of special injuries

not alleged is often competent for the purpose of showing the extent of the injuries, and not as an item of damages.
* * *."

Section 143, 25 C.J.S. at page 781:

"In actions for damages, it is essential that plaintiff prove all facts permitted by the pleadings and necessary to establishment of the damages he seeks, and such proof as is warranted by the pleadings may be made.

Only such matters and issues involving damages can be considered as are raised by the pleadings.

The pleadings and proof must correspond, although substantial correspondence between the pleading and proof as to damages is sufficient, and the damages recovered must be warranted by the pleadings, and the proof.

Since a defendant is entitled to know from the plaintiff's pleading the character of the injury for which he must answer, see supra Sec. 130, proof must be confined to the injuries alleged or to injuries resulting from those alleged. * * *."

One of the classic cases on this subject is the case of *Pacific Coin Lock Co. v. Coin Controlling Lock Co.*, 31 F. (2d) 38, (9 C.C.A.). In that case as in this one, the trial judge rendered his entire decision upon issues not covered by the pleadings nor relied upon by the parties and allowed damages which were not alleged in the complaint. The decision states on page 39:

"We are of the opinion that the judgment must be reversed for the reason that it was given for

a cause not within the issues. It is elementary that to be recovered damages must be pleaded. * * *.

In the second amended complaint appellee specifies six different particulars in which appellant is alleged to have breached the contract, but nowhere is it even intimated that it failed to pay rentals or that there was any sum due on that account, nor were any facts alleged from which it could be inferred that any such contention would be made at the trial. To the contrary, the pleading by implication clearly negatives such a claim. Immediately following the averments of the several alleged breaches are allegations of three distinct sources or items of damages, namely: (1) Damages in the amount of $100,000 on account of the alleged failure of appellant to assign to appellee contracts made by the former with numerous users of the locks, which, under the contract in suit, were to be turned over to appellee; (2) $4,575 as being the value of 183 locks at $25 each, which appellant declined, so it is alleged, to surrender; and (3) $25,000 on account of the value of coins alleged to have been in the lock receptacles at the time the contract was breached, and which, under the terms thereof, were to be the property of appellee. And the prayer is specifically for these three several items and nothing else. True, there is a prayer for 'other and further relief', but with or without this general prayer the court could grant only such relief as under some view of the law could be predicated upon the alleged facts. Here, as already noted, not only was there a complete failure to allege facts disclosing a default in the payment of any rent, but appellee expressly specified the particular damages it claims to have suffered, and under the general rule that, having specified the source and kind of damages he seeks

> to recover, a plaintiff cannot at the trial change his position, it is bound by these specifications. In any other view a complaint would not only be useless as a means of advising the defendant of the issues he must meet, but would be misleading and would constitute a trap. 17 C.J. 1021, 1022; *Rathbone et al v. Wheelihan*, 82 Minn. 30, 84 N.W. 638; *Hanson v. Smith* (C. C.A.) 94 F. 960.
>
> It is to be added that we do not have a case where there is a general allegation of damages which defendant did not seek to have made more definite or there is an allegation of general damages, or where damages have been imperfectly pleaded, or where the appellant fails seasonably and appropriately to object to the evidence as not being relevant to the issues, or where both parties tried the cause upon the theory upon which is was decided. * * *."

It is true that the Coin Lock case was decided under the Conformity Act requiring the Federal Court to follow the State practice. However, Rule 9g of the Federal Rules of Civil Procedure is merely a restatement of the rule in the State of California as followed in the Coin Lock case.

In the case of *McBride v. Callahan*, 173 Wash. 609, the trial judge injected into the trial, the theory of impossibility of performance as a defense to the plaintiff's action upon a contract. On page 616 the Supreme Court of the State of Washington stated:

> "No issues were framed under which the respondent subcontractors could recover on the

> trial court's theory — impossibility of performance was not pleaded, and there was no allegation of modification of the written subcontract which respondent subcontractors admitted they made with McBride."

Then after discussing the authorities, the court stated on page 620:

> "The subcontractors admitted that they made the subcontract with McBride. They denied failure to perform that contract. The trial court found, and the respondents contend in this court, that the contract was impossible of performance. The respondents failed to plead impossibility of performance of the contract. Matters absolving the subcontractors from liability for non-performance of the contract was not incorporated in an amended or supplemental complaint; permission so to do was not requested. The defense of impossibility of performance is not, under the pleadings, properly before us."

Thus, under the Federal law as well as the State law the trial judge cannot decide cases on issues not raised by the pleadings nor relied upon by either party. The trial judge's decision to allow recovery to the appellee upon a theory not pleaded cannot stand.

It may be argued that no exception was taken to the questioning of the witness, Doolittle, by the trial judge. From the nature of the questions asked, it was difficult to determine what ultimate fact the trial judge was attempting to reach. There being no jury present, no objection was indicated. Further,

under the law of the State of Washington, objections need not be taken to evidence admitted in violation of the parol evidence rule. In the case of *Mead v. Anton*, 133 Wn. Dec. 713 at page 717, the Supreme Court of the State of Washington stated:

> "The admission of testimony in violation of the parol evidence rule, does not make the testimony admitted competent, whether it is admitted without, or over, objection. In the recent case of *Dennison v. Harden*, 29 Wn. (2d) 243, 186 P. (2d) 908, we said:
>
> 'The parol evidence rule is not a rule of evidence; it is a rule of substantive law, and testimony falling within the inhibitions of the rule does not become admissible merely because it is not objected to: (Citing cases.)'"

As stated in the above quotation, the parol evidence rule is a rule of substantive law and not a rule of procedure in the State of Washington. The contract in question having been made and entered into in the State of Washington, the substantive law of that state applies.

While it is true the answers to the questions propounded by the trial judge do not on their face seem to violate the parol evidence rule, it must be conceded that in the final result, the construction placed upon these answers by the trial judge did alter the terms of the contract. Therefore, it makes no difference whether there was an objection to the questions

propounded by the trial judge since the evidence admitted was in fact in violation of the parol evidence rule.

For further authority on the application of Rule 9g see the case of *American Surety Co. of New York v. Franciscus*, 127 F. (2d) 810, wherein the Court of Appeals for the Eighth Circuit stated at page 817:

> "Rule 9(g) of the Rules of Civil Procedure, 28 U.S.C.A. Following section 723c, provides that 'When items of special damage are claimed, they shall be specifically stated.' Section 6040 of the Revised Statutes of Missouri 1939, Mo. R.S.A. Sec. 6040, provides: 'In any action against any insurance company to recover the amount of any loss, under a policy of * * * indemnity, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict.' The Supreme Court of Missouri has declared that such damages and attorney's fees are 'exemplary or punitive in character', *Jones v. Prudential Ins. Co.*, 173 Mo. App. 1, 155 S.W. 1106, 1110, and that 'there must be appropriate allegations in the petition showing that plaintiff claims and is entitled to these damages, and such allegations must be sustained by the proof.' *Fay v. Insurance Company*, 268 Mo. 373, 187 S.W. 861, 865.
>
> The petition in the instant case does not allege vexatious delay. There are no allegations show-

ing that plaintiffs are entitled to damages for such delay and for an attorney's fee. Accordingly there is no support in the pleadings for the allowance.

The judgment must be modified by striking therefrom the provision allowing attorney's fees for plaintiffs' attorneys in the sum of $1,500, and, as so modified, is affirmed."

In the case of *Burlington Transp. Co. v. Josephson*, 153 F. (2d) 372, at page 377, the court stated:

"Rule 9(g) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Following section 723c, provides that 'When items of special damage are claimed, they shall be specifically stated.'

In the case of *Simmons v. Leighton*, 60 S.D. 524, 244 N.W. 883, 884, the Supreme Court of South Dakota said: 'The distinction between general and special damages and the necessity of a special allegation to permit proof and recovery of damages is well settled. Special, as distinguished from general, damages are those which are the natural but not the necessary consequence of the act complained of. 17 C.J. 715. The plaintiff under a general allegation of damages may recover all such damages as are the natural and necessary result of such injuries as are alleged for the law implies their sequence. 2 Sutherland on Damages (4th Ed.) Sec. 418. Not every loss which may result from an injury is a natural and necessary result of the injury. To permit recovery of other or special damages there must be allegation of the specific facts showing such damages to apprise the defendant of the nature of the claim against him.'

This distinction between general and special damages prevails generally. 25 C.J.S., Damages,

Sec. 2; 15 Am. Jur., Damages, Sec. 10. General compensatory damages only were claimed in this case. In other words, only such damages were alleged in the complaint as are the natural consequence of the false arrest and false imprisonment, such as humiliation, embarrassment and the costs incident to obtaining a release from detention. In the federal courts an indispensable allegation in a demand for special damages is a statement 'of the special circumstances giving rise to the special damages.' *Huyler's v. Ritz-Carlton Restaurant & Hotel Co.*, D.C., 6 F. (2d) 404, 406, 407."

3. Argument on Specification of Error No. 4.

SUMMARY

The contract in this case provided for the settlement of disputes by the Contracting Officer, subject to written appeal by the the contractor within 30 days to the Secretary of the Treasury whose decision shall be final and conclusive upon the parties thereto. The appellee here being the contractor, did appeal to the Secretary of the Treasury. The Secretary of the Treasury acted upon the appeal and sustained the decision of the Contracting Officer. Therefore, the parties having agreed as to the manner of settling disputes, the appellee is not entitled to challenge the final decision of the Secretary of the Treasury.

ARGUMENT

General Provision 3 of the contract provided:

> "3. *Disputes*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

The appellee after receiving notice of the Contracting Officer's determination to cancel the contract under Special Condition 21, filed an appeal with the Secretary of the Treasury in accordance with General Provision No. 3. The disputed fact was whether or not the appellee had faithfully performed the services required under the terms and conditions of the contract. (Ex. 6-A). In acting upon the appeal, the Secretary of the Treasury expressed an opinion that General Provision 3 did not apply. However, despite such opinion, the Secretary of the Treasury went on and acted upon the merits of the appeal as though such provision was applicable and sustained the decision of the Contracting Officer. (Appendix V).

The decision of the United States Supreme Court in *United States v. Moorman*, Case No. 97, October Term, 1949, decided January 9, 1950 (not yet published in bound volume), seems to disagree with the

Secretary of the Treasury in his opinion that General Provision 3 is not applicable. This provision is in the contract and both parties are bound by its terms whether the Secretary of the Treasury believes such provision applicable or not.

In the case just cited, Moorman contracted to grade the site of a proposed aircraft plant. The compensation was fixed at 24c per cubic yard of grading satisfactorily completed. A proposed taxiway was shown in the drawings but not covered by the specifications. Thereafter, a dispute arose as to whether the grading of the proposed taxiway was covered by the contract. Upon demand by the Government, Moorman performed the grading work but filed a claim for compensation at the rate of 84c per cubic yard. The Government denied the claim and Moorman appealed under the provisions in his contract which are identical with General Provision 3 of the contract in the case at hand. The Secretary of War upon considering the facts, sustained the action of the Contracting Officer in denying the claim. The Court of Claims overturned the administrative decision. In reversing the Court of Claims, the Supreme Court stated:

> "In upholding the conclusions of the engineer the Court emphasized the duty of trial courts to recognize the right of parties to make and rely

on such mutual agreements. Findings of such a contractually designated agent, even where employed by one of the parties, were held 'conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.'

The holdings of the foregoing cases have never been departed from by this Court. They stand for the principle that parties competent to make contracts are also competent to make such agreements."

Then the Court goes on to say:

"It is true that the intention of parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language. *Mercantile Trust Co. v. Hensey*, 205 U.S. 298, 309. But this does not mean that hostility to such provisions can justify blindness to a plain intent of parties to adopt this method for settlement of their disputes. Nor should such an agreement of parties be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government.

Second. We turn to the contract to determine whether the parties did show an intent to authorize final determinations by the Secretary of War or his representatives in this type of controversy. If the determination here is considered one of fact, Sec. 15 of the contract clearly makes it binding. But while there is much to be said for the argument that the 'interpretations' here presents a question of fact, we need not consider that argument."

and finally states:

> "No ambiguities can be injected into it by supportable reasoning. It states in language as plain as draftsmen could use that findings of the Secretary of War in disputes of the type here involved shall be 'final and binding.' In reconsidering the questions decided by the designated agent of the parties, the Court of Claims was in error. Its judgment cannot stand."

The Moorman case and the case at hand cannot be distinguished. In both cases the contractor having exhausted his full rights under the contract is not entitled to have the courts second-guess the administrative decision. It will be noted that the above quotations from the Moorman case are squarely in accord with the appellant's theory in Specification of Error No. 1, that the trial court cannot rewrite a contract for the parties.

CONCLUSION

The trial Judge having determined that appellant had good and sufficient cause to cancel the contract, all issues of the lawsuit were then and there determined. The trial Judge having erred in rewriting the contract, the judgment must be reversed and judgment entered for the appellant.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

APPENDIX

I.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
Region 11
2028 Eighth Avenue
Seattle 1, Washington

PS
CONTRACTS
Tllrp-156 August 28, 1945

Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 22, Washington

Attention: Mr. H. L. Doolittle

Gentlemen:

Reference is made to our conference this morning relative to service under Contract No. Tllrp-156. As a matter of record, I should like to restate the substance of our discussion and the suggestions and recommendations which were made for improvement in the service under the subject contract.

In order to eliminate the possibility of undertaking hauling jobs with insufficient accessorial equipment, a procedure should be developed so that on services ordered over the telephone all necessary information can be obtained at one time and plans made for prompt and efficient accomplishment of the work requested by the ordering agency.

In order to eliminate delays and unsatisfactory service, additional equipment should be made available, particularly in the smaller capacity units, such as ½-ton, ¾-ton and 1-ton trucks. When ordering agencies describe the job to be performed, a truck of the minimum size required should be utilized, and in those instances where you are unable to furnish

a minimum size truck and by your own choice furnish a heavier vehicle, every precaution should be taken to insure billing at the minimum vehicle rate.

Your employees should be strictly trained and disciplined in the importance of rendering service in absolute compliance with the ordering agencies' wishes. You are a service agency and, as such, should observe the customers' wishes with respect to the manner in which jobs are performed when a customer expresses his preference. In those instances where the ordering agency indicates no preference in handling, then, of course, you should do the job in the customary and most efficient way. It cannot be emphasized too strongly that when an ordering agency specifies the manner in which a job is to be performed, it should be performed in that manner even though to do so may result in slightly greater cost than otherwise. This cost is frequently offset by advantages to the ordering agency in having the work performed in accordance with their specifications.

Along this line, it might pay dividends to discuss this at more or less regular intervals with your truck drivers so that "customer satisfaction" is always the objective in performing jobs under the contract.

It is sincerely hoped that the standard of performance under the contract will be improved as a result of our discussion, and such corrective measures as you believe necessary will be applied. If complaints continue and are found to be justified, we should otherwise be forced to seek relief in accordance with the terms of the contract. We hope this will not be necessary.

Very truly yours,

CHARLES E. STREET, Acting Chief
Purchase and Supply Division

GKClark:LP

II.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
Region 11
2028 Eighth Avenue
Seattle 1, Washington

PS
CONTRACTS
Tllrp-156 September 26, 1945

Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 22, Washington

Attention: Mr. H. L. Doolittle

Gentlemen:

Reference is made to our discussion this forenoon concerning your service contract No. Tllrp-156, with specific reference to Item No. 2(A).

I have reviewed the record and regret to tell you that I can see no way by which an amendment to the contract can be made, or any concessions legally granted to you. As I understand it, you are chiefly concerned about the small items of household goods aggregating less than 1,000 pounds. Your quoted price, 75c per hundred pounds, is identical to that extended by another bidder at the time award of the entire contract was made to your firm. There is no evidence, therefore, that any mechanical error occurred in the statement of price when the bid was submitted.

I understand, in a discussion you had with Mr. G. K. Clark, purchasing and contracting officer in this office, it was your contention that your representatives have been required, in some cases, to await the convenience of the Government employee whose household goods were to be moved, thus resulting in

a loss of time for which no compensation can be granted. I am informed, however, that you have been asked to supply this office with details of future similar instances so that the cause can be removed. We shall be very glad to cooperate fully with you in this direction.

The review of the record and discussion with Mr. Street brought to light certain criticisms of your services which have already been enumerated in his letter of August 28 to you. I only want to add a word of caution to you to comply fully with the intent and letter of the contract. The contract provisions contemplated clearly that you must be in a position to supply all equipment and manpower and other services promptly and in an efficient manner and, aside from the fact that any deficiencies on your part jeopardize your present contract and your surety, any unsatisfactory experience with this particular contract will be an important factor in the award of any future contracts. A service contract of this nature will be a permanent arrangement hereafter, so full compliance with its terms, I am sure you agree, will be an important concern to you in the long run.

Very truly yours,

WM. B. IHLANFELDT
Regional Director

WBIhlanfeldt:LP
cc: Ihlanfeldt

III.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
Seattle 1, Washington

PS
CONTRACTS
Tllrp-156

February 20, 1946

REGISTERED MAIL

Foster Transfer Company
1310 East Pine Street
Seattle 22, Washington

Gentlemen:

Reference is made to Contract Tllrp-156, wherein Items 1, 2, 3 and 4 of Bid Invitation Tllrp-45-342 were awarded to you June 26, 1945, for the fiscal year 1946.

Please be advised that in conformity with numbered Paragraph 21 of "Special Conditions", the Government is exercising its rights of cancellation effective at the close of business February 28, 1946.

Accordingly, Contract Tllrp-156 shall have no force on and after March 1, 1946, and in the event you are requested by any Federal Agency to perform any of the services hitherto covered by Contract Tllrp-156, you are advised to notify the ordering agency that the tendered job can not be performed under the contract and, if ordered, must be by virtue of separate negotiations and agreement with the specific agency involved.

A copy of this notice of termination is being furnished all Federal Agencies so that there should be very few, if any requests for services under Contract Tllrp-156 subsequent to March 1, 1946.

Very truly yours,

WM. B. IHLANFELDT
Regional Director

IV.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
1524 Fifth Avenue
Seattle 1, Washington

P
SUPERVISION
General

February 28, 1946

Messrs. Maxwell & Seering
Attorneys at Law
White-Henry-Stewart Building
Seattle 1, Washington

Gentlemen:

Your letter of February 25, 1946 is received. It is assumed that reference in your letter to a Treasury Department letter of February 12 is an oversight, inasmuch as the only recent letter to the Foster Transfer Company from this office carried the date of February 20, 1946 cancelling Contract Tllrp-156.

We are unable to provide you with any appellate procedure in regard to this termination, inasmuch as the contract specifically provides, (Paragraph 21, Page 9):—"The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause." This provision supercedes the General Provision to which you have made informal reference, viz., Article 3 which reads as follows:

> "3. Disputes. — *Except as otherwise specifically provided in this contract,* (underscoring supplied) all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclu-

sive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

Since Paragraph 21, page 9, specifically provides for cancellation, there can be no question of our authority for doing so.

In any event, however, we are entirely willing to supply a statement of the principal reasons for this action, as follows:

1. During the contract period of approximately seven months, numerous oral and some written notices and protests were filed with Mr. Doolittle concerning the inadequacy and generally poor condition of his automotive equipment. Complaints from Federal Agencies are on file in this office on this point. Our letters of September 26 and August 28, 1945 bear on this subject. No material improvement of the situation resulted from these protests.

2. In a number of instances, open flat-bed trucks were provided by the contractor despite the fact closed trucks (or vans) were specifically ordered for specific jobs in inclement weather, with the result that Government property was damaged. In one instance, a federal agency ordered a closed van to transfer special technical radio and laboratory apparatus. After a delay of two days, the contractor appeared on the scene with a flat-bed truck in inclement weather. In another case, Government furniture was rain damaged when moved on a flat-bed truck in wet weather without adequate quilting. In still another case, a flat-bed truck was sent (in the absence of an available van) to move the household goods of a Federal employee. This employee reported that the furniture got extremely wet before it reached the contractor's warehouse. These are examples only.

3. Despite numerous oral promises, Mr. Doolittle has either been unable or unwilling to provide

an adequate number of trucks to efficiently perform the job.

4. Frequently, Mr. Doolittle supplied trucks larger than necessary, or conversely, smaller than required, involving additional costs to the Government.

5. By actual, first-hand experience acquired by us during the recent transfer of Government property from our Wallingford Warehouse, to 1518 First Avenue South, Seattle, and on a basis of complaints by other Federal Agency users, Mr. Doolittle's supervision and management were inadquate to the point where his employees either refused to perform efficient work, or were without proper direction to enable them to do so. In one instance, one of his employees, evidently intoxicated, attacked a Government employee in the presence of Mr. Doolittle. Mr. Doolittle failed to intervene, although we understand he subsequently discharged the man.

Criticism of Mr. Doolittle and his lack of management was frequently expressed by his own employees to our representative, both on and off the job. This expressed lack of confidence in his leadership noticeably depreciated the efficiency of his people and thus prolonged the jobs for which the Government paid additional amounts of money. Moreover, this condition caused delays in effecting the transfer of Government property, often at great inconvenience and expense to using federal agencies.

I regret the necessity for cancelling this contract, but I had no alternative than to do so to protect the Government's best interests.

Very truly yours,

WM. B. IHLANFELDT
Regional Director

V.

July 11, 1946

Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 1, Washington

Gentlemen:

Reference is made to your appeal from the action of Mr. William B. Ihlanfeldt, Region Director, Procurement Division, Treasury Department, Seattle, Washington, cancelling, effective February 28, 1946, Contract No. Tllrp-156 pursuant to Paragraph No. 21 of the General Conditions thereof reserving to the Government the right to cancel such contract at any time for what may be deemed good and sufficient cause and terminating your right to proceed further thereunder. You assign as a basis for such appeal Paragraph 3 (Disputes) of the General Provisions of Service Contracts attached to and made a part of such contract and Procurement Regulations No. 3 .

Inasmuch as Procurement Regulations No. 3 were issued by the War Department, they have no application to contracts awarded by this Department and, accordingly, will not be considered in the decision on such appeal.

It appears from the record that the foregoing contract for drayage, packing and crating of supplies, equipment, furniture, and household goods in Seattle, Washington, as may be required by the Procurement Division of this Department in Seattle, Washington, and such other Governmental activities in such city as might desire to utilize the services provided for thereunder during the fiscal period beginning July 1, 1945, and ending June 30, 1946, was awarded to your company under date of June 26, 1945, as the low bidder and upon assurances by responsible officials of your company that you owned or had under rental

adequate equipment to perform the services stipulated therein and further that you had adequate and trained personnel to operate such equipment and perform such services. The record establishes that you were notified in writing on two occasions and orally on numerous other occasions that your performance under such contract was unsatisfactory and that you were called upon to remedy the conditions brought to your attention which you neglected and failed to do. Such unsatisfactory services consisted of delays after the receipt of adequate advance notice in performing necessary drayage services seriously inconveniencing proper performance of necessary Government operations; inadequate equipment, either larger vehicles than necessary to perform the job described or smaller vehicles than necessary to perform such jobs, thus increasing the expense to the Government for performing the services, in the former by charges for such larger vericles at the contract rate and in the latter by excessive time resulting in excessive cost. In some instances you furnished open transportation where the order specifically stipulated closed transportation because of the type of equipment to be moved. The personnel supplied in many instances was inadequate either as to numbers or ability, thus unduly delaying the completion of the job at additional expense to the Government and requiring in some instances the assistance of Government personnel to properly supervise your employees so as to insure satisfactory handling of the transportation. All of the foregoing deficiencies, occurring in the performance of services for other than the Procurement Division, have been reported to such Procurement Division and in turn relayed to officials of your company. In addition and in connection with services performed for the Procurement Division, all of the foregoing deficiencies likewise appeared and were reported to officials of your company with the demand that necessary steps be taken to rectify them. During the course of the consolidation of two Pro-

curement Division warehouses in Seattle which you definitely assured officials of the Procurement Division would be completed as to a portion thereof within a period of seven days without any break in service to be performed for other governmental agencies eligible to obtain services under such contract, such performance was not completed until eleven days had expired at added expense to the Government due to inadequate equipment, inadequate personnel and improper management and supervision. In addition and during such period, you were unable to serve the demands of agencies other than the Procurement Division with the result that necessary Government operations were seriously delayed.

The determination to cancel your contract was based not on the fact that your services had been unsatisfactory with respect to all governmental agencies for whom such services were performed but as a result of complaints received from those governmental agencies which contended that your services had been inadequate in any or all of the foregoing respects. With reference to your statement that representatives of all agencies contacted by you for which services had been performed under the contract stated that no complaint existed as to the performance of such services presumably supporting such statement by Exhibit "D" to your appeal, there is no information to indicate that the parties signing such statement had any personal knowledge of the facts concerning which they have spoken or were authorized to express an opinion on behalf of the agencies which they represented as to the manner in which the services were performed. In at least two instances agencies represented in such statement have indicated that the employees signing such statement had no authority to do so; that such employees were without adequate knowledge of the facts to make such statements on behalf of such agencies; and that the services were in fact unsatisfactory.

Taking into consideration the facts as they appear in the records of this Department, I am of the opinion that the action of Mr. Ihlanfeldt, the contracting officer on your contract, in cancelling your contract under the provisions of Paragraph 21 thereof was amply justified and, accordingly, sustain such action and deny your appeal.

Very truly yours,

(Signed) E. H. Foley, Jr.
Acting Secretary of the Treasury

cc: Maxwell & Seering
Attorneys at Law
804 White Building
Seattle, Washington

No. 12401

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

vs.

FOSTER TRANSFER COMPANY, a corporation, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

FILED

APR 1 1950

PAUL P. O'BRIEN, CLERK

BRIEF OF APPELLEE

MAXWELL, JONES & MERRITT,
Attorneys for Appellee.

4454 Stuart Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

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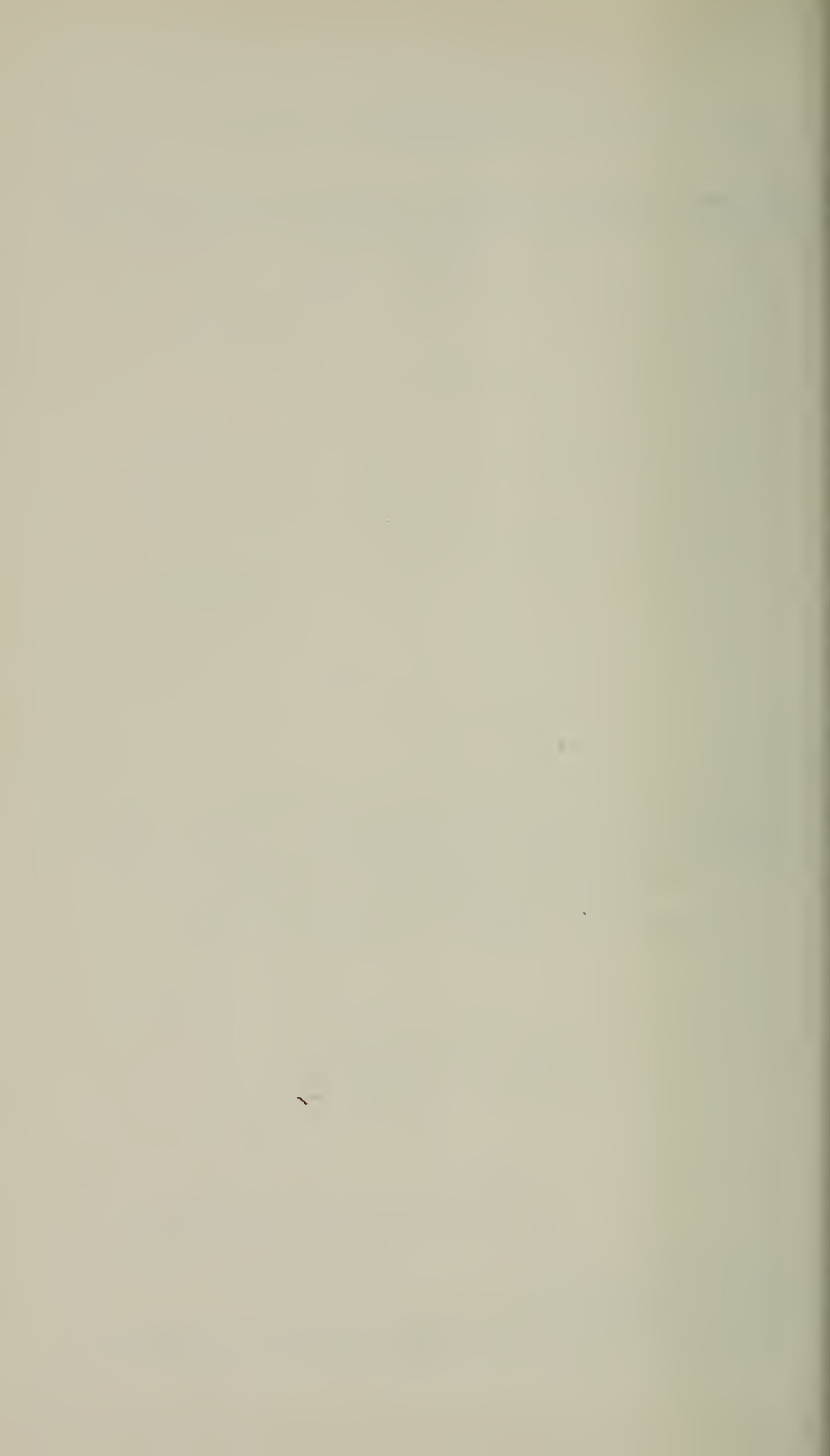

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In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*, vs. FOSTER TRANSFER COMPANY, a corporation, *Appellee*.	No. 12401

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Appellee adopts the statement on jurisdiction set out in appellant's brief.

STATEMENT OF THE CASE

On June 26, 1945, the United States Treasury Department, Procurement Division, entered into a written contract with the Foster Transfer Company, a Washington Corporation, appellee herein. Under the terms of the contract, the appellee agreed to perform drayage, packing and crating services for the appellant. The contract is to be found beginning on page 24 of Exhibit A-6.

Appellee began performing under the contract on or about July 1, 1945. Appellee's representative, on or about August 28th, 1945, called upon Messrs.

Street and Clark, representatives of the Treasury Department, Procurement Division, with reference to experience of appellee under the contract. This conference was held at the request of appellee. At this meeting, representatives of the department, mentioned to appellee certain suggestions to assist the company in carrying out the contract, and Mr. Clark, one of the representatives, and Mr. Doolittle, of the company, worked out a program for "the company to follow" (Tr. 69-70-71-72 and 73).

On or about September 26th, Mr. H. L. Doolittle, a representative of the appellee, called upon appellant and talked with Mr. William D. Ihlanfeldt, Regional Director, for the purpose of trying to work out an adjustment in the contract rates, for the handling and hauling of small items of household goods aggregating less than 1,000 pounds. The appellee's experience had been that in these instances, its personnel and equipment were tied up, waiting for the convenience of Government employees, whose household goods were to be moved, thus resulting in loss of time for which no compensation was allowed under the contract (Exhibit A-5).

In December 1945, the Treasury Department Procurement Division, contemplated moving Government owned equipment from the warehouse at 3402 Wallingford Avenue, to the warehouse at 1518 First Avenue South in Seattle, and issued a bid invitation. Appellee, upon learning of this, protested to the Procurement Division, that this move was covered by appellee's contract (Tr. 213). Under date of December 14th, 1945, the Treasury Department, Procurement

Division, addressed a letter to appellee, stating in part:

> "It was not contemplated that movements requiring the furnishing of special facilities such as lift jacks, flats, loading tractors and similar equipment would fall within the contract; such moves being susceptible of detailed specifications to be covered by special invitations to bid, such as our Tllrp-46-104. Nonetheless, the U. S. Treasury Department is considering your offer to handle the move under Contract Tllrp-156, provided the government's interests are definitely protected by assurance that the inventory (approximately $250,000) can be moved within a stipulated period, 7 working days from date of starting, at a reasonable cost." (Tr. 211)

Appellant finally decided to handle the move from Wallingford Avenue to the warehouse on First Avenue under appellee's contract. At no time during the period appellant had under consideration whether this job should be handled under appellee's contract or a separate contract, did the appellant raise any objection, or complaint of the services rendered by the appellee (Tr. 250 and 251). Mr. Street, representing appellant, admitted that at no time during the conversation and correspondence between appellant and the Appellee, was any mention made by Appellants that Appellee was not qualified to do this work or that its performance under the contract here in question was, or had ever been, unsatisfactory (Tr. 252).

Thereafter by letter dated February 20th, 1946, the Appellee was notified that the Government was cancelling the contract effective as of the close of busi-

ness February 28, 1946 (Exhibit 2). The Government rested its right to cancel upon Section 21 of the Special Conditions of the Contract, to-wit:

> "21. The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause."

Thereafter Appellee brought this action alleging it had faithfully performed under the contract and that the action of the Government had been wrongful, arbitrary and without cause and that as a result Appellee had been deprived of its profits for the unexpired portion of the contract in the amount of $5,000.00 (Tr. 2, 3 and 4).

Appellant in its answer admitted the existence of the contract and that the court had jurisdiction but denied all other allegations. By affirmative defense the appellant alleged: (1) The award and execution of contract No. Tllrp-156, with the plaintiff, (2) That the contract provided that the Government could cancel the same at any time for what may be deemed good and sufficient cause, (3) That Article III of the general provision of the contract provided:

> "3. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

(4) That the contract had been cancelled by the Gov-

ernment for good and sufficient cause, after which the plaintiff or appellee had taken an appeal to the Treasury Department and, (5) that the Secretary of the Treasury had sustained the action of the contracting officer in cancelling the contract.

Appellee by reply admitted the execution of the contract. (2) The provision reserving to the Government the right to cancel, but denied that contract contained a provision for an appeal to the Secretary of Treasury and further denied that the contract had been cancelled for just cause.

At the trial, Mr. L. H. Doolittle, President of the appellee corporation testified with reference to damages sustained by the corporation, because of the wrongful cancellation of the contract. The trial judge interrupted the examination of the witness to inquire whether or not the appellee had committed itself to any expenses which could not be terminated within the time allowed, between the receipt of the notice of cancellation and the effective date thereof (Tr. 62, 63, 64 and 65).

The trial judge in his oral decision (Tr. 295, 296) and in the Findings of Fact (Tr. 12, 13, 14) found that the appellant, through the Regional Director for Region 11, Treasury Department, Procurement Division "for just cause, by letter of February 20, 1946" mailed to the plaintiff, "cancelled said contract No. Tllrp-156, effective February 28, 1946" and "that the period of time granted by defendant before the taking effect of the cancellation was unreasonable under the circumstances in that it did not extend suf-

ficient time to protect itself against certain fixed expenses necessarily incurred to enable it to perform its contract with the defendant." The trial court further found that because of the unreasonably short notice, Appellee had been damaged in the sum of $1,500.00. Judgment was entered for this amount.

QUESTIONS RAISED

1. Where a contract reserved to one party the right to "cancel the contract at any time for what may be deemed good and sufficient cause," is reasonable notice of cancellation or intention to cancel the contract necessary?

2. Where the plaintiff prays for damages for loss of profits, is it error for the trial court to interrogate a witness who was testifying as to the damages on continuing items of expense paid and incurred to carry out a contract which was terminated without reasonable notice?

ARGUMENT

Appellant's Specification of Error No. 1

Summary

Section 21 of the Special Conditions of the contract is indefinite and uncertain. The contract is therefore ambiguous in respect to its duration and termination. The intent of the parties is to be determined. The contract was one for an indefinite period. Where the parties fail to provide a time for notice of intention to terminate, a reasonable time is implied. The trial court did not err in holding the Government was required to give a reasonable notice before terminating the contract.

Argument

The fallacy of the appellant's argument rests upon the assumption that Section 21 of the Special Conditions of the contract is definite and certain, that the contract is not ambiguous and that the trial court committed error by deciding that a reasonable notice of intention to terminate it was not required or ever intended by the parties.

This assumption on the part of the Government's counsel is not supported by the testimony of William D. Ihlanfeldt, manager of the Federal Bureau of Supply and Regional Director for the Treasury Department, Procurement Division. He testified that consideration was given to the need for notice (Tr. 268). The Government gave only six or seven days' notice which the trial court properly held to be unreasonable.

The contractual provisions for termination for good

cause has been before the courts. The rule in reference thereto is tersely stated in 12 Am. Jur., Contracts, Sc. 434 (page 1014) to-wit:

> "A question of interpretation sometimes arises when the right to rescind is not given absolutely but for some specified cause. Such question has arisen with respect to the right to revoke for *good cause*. The requirement of 'good cause' as something on which the right to revoke by one or the other should depend has been declared to be too vague to be fairly intelligible. In such a connection it has not such a distinct sense as to furnish a common an intelligible criterion for the parties, or any definite sense whatsoever. It is impossible to say that the will of the parties concurred and that each meant exactly what the other did, or even to say what either meant. The room for difference of opinion is immense, and the case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort. The legal consequence of prescribing such a ground of revocation is that as the passage in question is ineffective on account of its radical uncertainty, there is nothing to detract from the exercise of the right of revocation at any time for cause assigned in good faith." (Emphasis supplied)

See also *Wilcox & G. Sewing Machine Company v. Ewing*, 141 U.S. 627, 35 L. ed. 882, 12 S. Ct. 94; *Cummer v. Bucks*, 40 Mich. 322, 29 Am. Rep. 530.

Obviously Section 21 of the Special Conditions of the Contract here in question, is indefinite and uncertain. It is ambiguous. Resort must be had to the considerations before the parties when the contract

was entered. The trial court saw and heard all of the witnesses and properly held that the right to cancel could be exercised on reasonable notice.

Where the language of a contract with respect to its duration or termination lacks precision, a question of interpretation arises 12 Am. Jur. Contracts, Section 305. The contract here was one for an indefinite time up to one year. Being indefinite as to termination, the only reasonable intention that can be imputed is that the contract may be terminated by the party entitled to terminate it giving to the other party a reasonable notice of his intention to do so (12 Am. Jur. Contracts, Sec. 305).

The record shows that during the seven months the contract was in effect, Appellee handled between twelve and fourteen hundred jobs (Tr. 184). Appellee initiated two conferences with appellant. The first on August 28, 1945, because its equipment and men were tied up awaiting the convenience of Government employees, after appellee had reported at the time and place ordered (Tr. 70, 72). The second on September 26, 1945, in an effort to get a rate adjustment for handling small items of household goods aggregating less than 1,000 pounds (Tr. 76, 77, 269). At these conferences initiated by Appellee, Appellant, in its confirming letters and in general terms indicated that some complaints had been made against Appellee's services. These two conferences were confirmed by Appellant's letters introduced as defendant's Exhibits A-4 and A-5, respectively. It is worthy of note that on February 19, Mr. Street, Acting Chief, Purchase & Supply Division, who was instrumental in

bringing about the termination of the contract, wrote a "memorandum addressed to: The Record." In this self-serving report, indubitably written for the purpose of rationalizing the termination of the contract, Mr. Street says:

> "Although these agencies have reported these unsatisfactory conditions by telephone, very few have felt inclined to present written data for the record, although some have done so, as for example, the Office of Surplus Property and the Fish and Wildlife Service, whose letters are self explanatory and now in the files." (Tr. 230)

The alleged complaints were certainly not material if no written reports were made. It is not unreasonable to assume that Mr. Street on February 19, 1946, solicited complaints. This witness was unwilling to deny that he had asked Mr. L. H. Doolittle to absorb demurrage on a shipment that had occurred because of Mr. Street's default (Tr. 247-248). His self-serving reports must be considered in the light of the whole record.

In December 1945, the appellee contacted the Government with reference to a proposed move of Government equipment from the warehouse 4402 Wallingford Avenue to the warehouse at 1518 First Avenue, Seattle. It appears that the Government was then considering letting this move on separate contract and that the appellee asserted that the move was to be covered by the contract which he had with the Government. During these discussions, the Government representatives made no complaints to Appellee regarding the services rendered by Appellee under this contract. It was the Government's position that they

had not originally intended that such move as the one under consideration would be covered by the Appellee's contract (Tr. 211, 264). No complaints were received by the Appellee after the Wallingford job was completed.

On February 21st, 1946, the Appellee received notice from the Treasury Department, Procurement Division, cancelling his contract effective February 28, 1946.

These facts and considerations were all before the trial court who heard the witnesses and undoubtedly considered that while the Government had the right to terminate the contract in accordance with the reservation contained in the agreement, this right could only be exercised upon reasonable notice to the Appellee.

ARGUMENT

Appellant's Specification of Errors Nos. 2 and 3

Summary

The Appellant failed to object to the questions asked by the trial court and after the questions had been answered at no time moved to strike the answers. Appellant's contention that the questions by the trial judge introduced a new issue is incorrect. Furthermore, Appellant's contention that the parol evidence rule was violated by the court's questions relating to damages is obviously erroneous. The parol evidence rule is not applicable and cannot be invoked to preclude proof of damages.

Argument

Assuming for the purpose of this argument that the questions by the trial court and the answer solicited did relate to special damages, then the defendant waived the rule requiring the pleading of special damages and is deemed to have done so by his failure to object to the trial court's questions or to move to strike questions and answers after the same were in the record. The rule is tersely stated in 15 Am. Jur., Damages, Sec. 306, as follows:

> "The defendant may waive the rule requiring special damages to be alleged, however, and will be deemed to have done so where evidence to furnish a basis for the recovery of such damages is admitted without objection. Undoubtedly, a plaintiff will, when objection is made to the introduction of evidence of special damages on the ground that they have not been pleaded, be permitted to amend his pleadings so as to embrace claims therefor. An objection that the allegations of a pleading are insufficient to cover special damages, when made after verdict, is too late."

Parol evidence rule:

Counsel for appellant erroneously argues that the parol evidence rule was violated by questions propounded by the trial court relative to specific items of damage suffered by Appellee. The contract contains no clause for liquidated damages. The parol evidence rule has no application to the case at bar. If counsel's contention were correct it would be impossible to prove damages in any case arising out of a breach or wrongful termination of a contract.

ARGUMENT

Appellant's Specification of Error No. 4

SUMMARY

The contract here in question provided for an appeal to the Secretary of the Treasury on all disputes concerning questions of fact arising under the contract. The basis of Appellee's claim arises not out of a dispute of fact but is predicated upon a question of law; namely, the failure of the appellant to give reasonable notice before seeking a termination of the contract. The Secretary of the Treasury correctly held that under the circumstances in this case, Paragraph 3 of the General Provisions of the contract was not applicable.

Argument

General Provision 3 of the contract provided:

> "3. *Disputes*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime, the contractor shall diligently proceed with performance."

Appellee did appeal the action of the Procurement Division in terminating the contract. The Secretary of the Treasury, although rendering a decision upholding the contracting officer, in his reply to the Appellee herein, stated:

> "Inasmuch as Procurement Regulations No. 3 were issued by the War Department, they have no application to contracts awarded by this Department and, accordingly, will not be considered in the decision on such appeal." (See Page 1, Defendant's Exh. A-6)

Counsel for the Government cites in support of his contention the case of *U. S. v. Moorman*, Case No. 97, October Term 1949, decided January 9, 1950 (not yet published in bound volume).

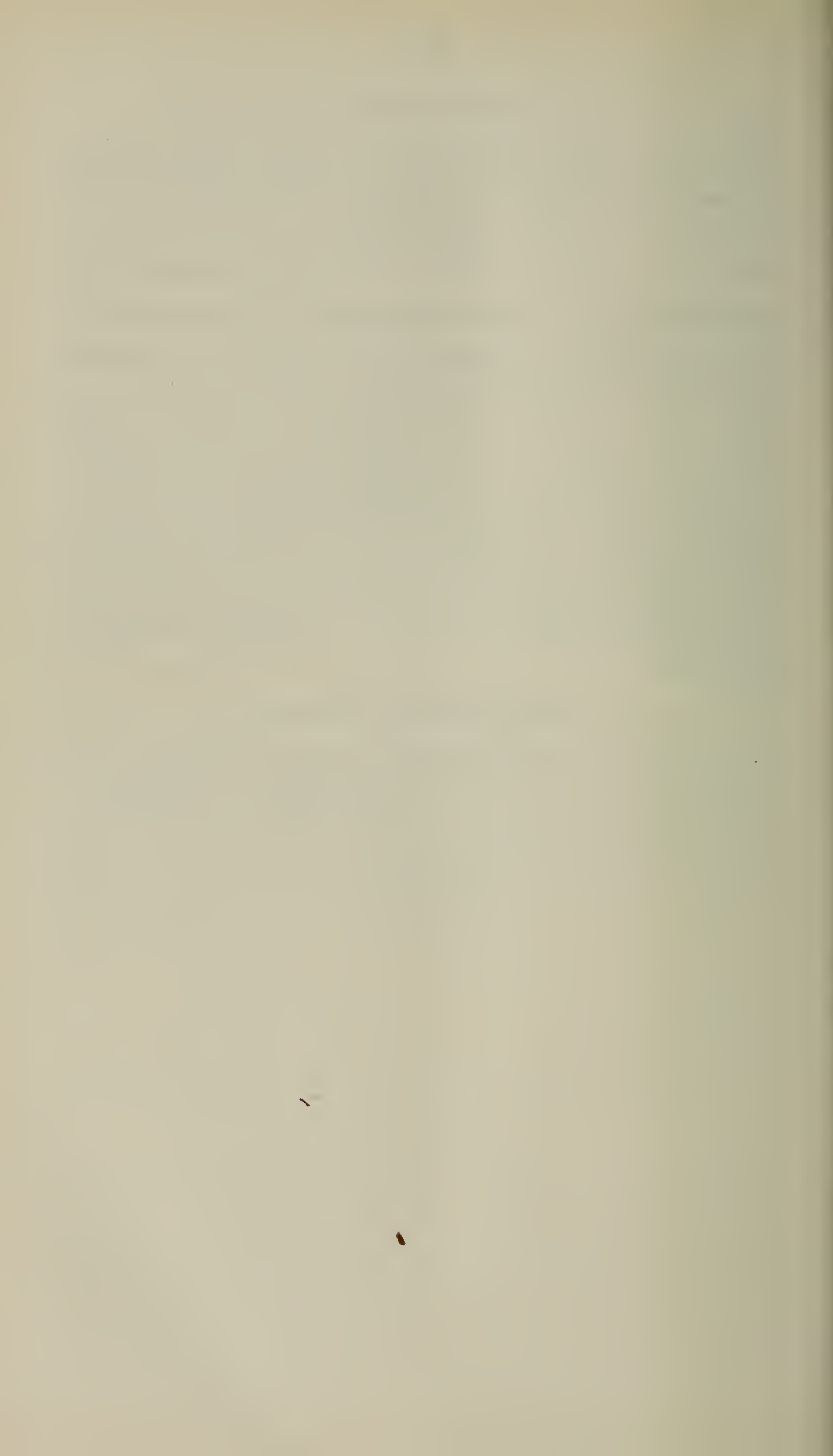
This case has no application to the question presented for consideration of the court in this instance. In the *Moorman* case, a question of fact was presented. In the principal case, the trial court was called upon to decide a question of law. The instant case therefore presents not a question of fact upon which Appellee is seeking a "second guess" as Appellant contends. Appellee is merely urging that the trial court did not err in holding that under the circumstances here, the Government must respond in damages because of its failure to give Appellant reasonable notice of its intent to cancel the contract.

CONCLUSION

The trial judge heard the witnesses, considered all of the circumstances, and found the contract to be ambiguous. He then resorted to the rule that where the contract provided no time for giving of notice, that a reasonable time would be implied. He found that the Government in this case had not given to Appellee reasonable notice of its intention to terminate the contract; that Appellee had suffered damages in the amount of $1500.00 for expenses incurred by Appellee in order to permit it to execute and carry out its obligations under the contract. There is ample evidence in the record to sustain the findings of the trial court. The judgment entered herein for Appellee should be sustained.

Respectfully submitted,

MAXWELL, JONES & MERRITT,
Attorneys for Appellee.



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Appellee.

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HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

FILED
MAY 1 - 1950

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PAUL P. O'BRIEN,
CLER

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HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

STATEMENT OF CASE

The statement of the case as narrated in the appellee's brief would convey the impression that the appellee was unaware of any unsatisfactory performance of the contract until he received the appellee's notice of cancellation. Such a contention is not borne

out by the record. The two letters of August 28, 1945, and September 26, 1945, (Exhibits A-4 and A-5) transmitted to the appellee by the appellant are replete with references to "delays and unsatisfactory service", "insufficient accessorial equipment", "deficiencies on your part", "criticisms of your service", and hopes that the standard of performance by the appellee would improve. Thus the appellee's inference that the notice of cancellation dated February 20, 1946 was a surprise is without any foundation whatsoever.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 1

The appellee bases its answer to Specification of Error No. 1 upon the contention that the phrase as used in the contract "good and sufficient cause" is ambiguous and uncertain. It is presumed that the appellee is in reality attacking the court's finding of fact that the appellant had good and sufficient cause to cancel the contract, and contends that under the evidence and the law, the court was not justified in making such a finding. There was an abundance of evidence to the effect that the appellee had not faithfully performed the contract and that the appellant acted in good faith in cancelling the contract.

The authorities are in accord that a right to

cancel a contract for "good and sufficient cause" is a right which will be enforced unless there is an absence of good faith on the part of the party exercising such right. Even the authorities cited by the appellee in 12 Am. Jur. support this contention. The quotation set out in the appellee's brief is based upon *Cummer v. Bucks*, 40 Mich. 322. In that case the contract provided, "will also agree that for good cause this agreement shall be cancelled upon sixty days notice by either party." One of the parties cancelled the contract, giving the required sixty days notice. The other party instituted action for recovery of lost profits as in the case at hand. Defendant prevailed in the trial court and in sustaining the trial court, the decision states,

> "The passage in question being ineffective on account of its radical uncertainty, there was nothing to detract from the exercising of the right of revocation as it actually occurred, provided the plaintiff in error acted in good faith. Nothing more was required. On this record, the claim for profits is at least irrelevant."

The following quotation found under Note 43 in 17 C.J.S. on page 889 is supported by many cases and is the law on this subject:

> *"Just cause" or "good cause"*
>
> "As used in contracts providing for termination of contract by either party for "just cause"

> or "good cause," the quoted phrases are not synonymous with "legal cause" which exists independently of the contract, but include causes outside of legal cause, which must be based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power to terminate." (Citing cases.)

The United States Supreme Court has passed upon this question in *Goltra v. Weeks*, 271 U.S. 536, wherein on page 548, the court stated:

> "The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. Here, nothing of the kind is shown. Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a valid issue under the contract is left to the decision of a government officer. *Kihlberg v. United States*, 97 U.S. 398; *Sweeny v. United States*, 109 U.S. 618; *United States v. Gleason*, 175 U.S. 588; *United States v. Mason & Hanger Co.*, 260 U. S. 323; *United States v. Henley*, 182 Fed. 776; *Martinsburg R. R. Co. v. March*, 114 U.S. 549."

The appellant's Specification of Error No. 1 is directed at the trial court's error in interpreting the words, "at any time" to mean "upon giving reasonable notice". It is interesting to note that the appellee's brief completely fails to answer the appellant's argument on this question. The trial court interpreted "at any time" to mean "upon giving a rea-

sonable notice". The trial court then found that a reasonable notice was not given and allowed the plaintiff a recovery sufficient to place it in a position of status quo.

The appellant contends that in so doing the trial court substituted "upon giving reasonable notice" for the words "at any time". As used in the contract, the words "at any time" refer to the appellant's right to cancel. The term "cancel" is, of course, synonymous with the word "terminate." Since cancel or terminate means to bring to an end, the words "at any time" can have no other meaning than that which is normally implied thereby. It was error for the trial judge to give the words "at any time" a special meaning. The following is quoted from 12 Am. Jur., Contracts, Section 236:

> "*Meaning of Words.* — Words will be given their ordinary meaning when nothing appears to show that they are used in a different sense and no unreasonable or absurd consequences will result from doing so. Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind can discover."

A learned discussion of the meaning of the words " at any time" is found in *Haworth v. Hubbard*, 44

N. E. (2d) 967, 144 A.L.R. 881, wherein the court stated:

> "There is language in some of the cases to the effect that where no time for performance is specified in a contract it must be performed within a reasonable time, and that where the contract provides that it is to be performed within a reasonable time the effect is the same as though no time had been mentioned and the words 'within a reasonable time' had been omitted. To say therefore that 'any time' means 'within a reasonable time' is to say that the words 'any time' are to be given no effect whatever. Such a construction violates the fundamental rule which requires that all of the words in a contract be considered in determining its meaning."

In *Magee v. Scott & Holston Lumber Co.*, 80 N.W. 781, 78 Minn. 11, the parties had entered into a written contract which provided in part, "It is furthermore mutually agreed by the parties hereto that, in case the services performed by the party of the second part shall not be satisfactory, then, and in that event, the party of the first part reserves the privilege of terminating this contract *at any time*." (Italics ours). The defendant, party of the first part, upon finding that the other party had left the job, hired another to do the work. When the plaintiff, party of the second part, returned three days later, the defendant "promptly notified him the contract was terminated" and that he would no longer

receive or accept his services. The plaintiff brought an action to recover the value of his contract. The trial court directed a verdict in favor of the defendant because there was no showing of a lack of *good faith* on the part of the defendant. The Supreme Court of the State of Minnesota affirmed the trial court.

See also *Ripley v. Lucas*, 255 N.W. 356, 267 Mich. 682, which holds that the court cannot alter or amend contracts by substituting a different method of revocation from that which is stipulated therein.

The end result in the court's substituting the words "within a reasonable time" for the words as actually used in the contract, "at any time", was to hold the appellant liable for restoring the appellee to a status quo. If such had been the intention of the parties, a provision to that effect would have been inserted in the contract. There being no such provision in the contract, the court erred in forcing such an interpretation. The law on this question is tersely stated in 17 C.J.S., Contracts, Section 401, at page 891, "Unless the contract so provides, the status quo of the parties need not be restored on its termination."

Attention is called to the nature of this contract. The appellee was to perform such drayage

services as required by the Procurement Division of the Department of the Treasury and for such other Government agencies who desired to use their services under the contract. As such services were performed, the same were paid for by the appellant. The effect of the cancellation was not to deprive the appellee of compensation for services already performed, but only terminated the appellee's right to perform for the Procurement Division after the effective date of the termination. By Special Condition No. 21, the appellant reserved the right to terminate if the services of the appellee were unsatisfactory. In other words, the appellant did not intend to be bound to continue to use the appellee's services if the appellee did not furnish satisfactory services. No other interpretation can be placed upon the provisions of Special Condition No. 21. Such a provision is not contrary to any public policy. Without the right to so terminate the contract, there would be no incentive for the appellee to faithfully perform. The obvious purpose of Provision No. 21 was to give the appellant the right to insist upon prompt and satisfactory service from the appellee and unless the appellee did perform satisfactorily, the appellant could cancel the contract. The appellee has no legal or equitable claim for restoration to a status quo when the cancellation

was occasioned solely because of his gross unsatisfactory performance.

If the appellant were required to postpone the effective date for termination of the contract for a month or longer, as the trial judge inferred it should, then the Procurement Division is forced to continue to accept the appellee's unsatisfactory service for a month or defer its need for drayage for that period. So long as the contract remained in force, the Procurement Division was bound to use the appellee's services in its business. However, the appellant was not required under the contract to give the appellee any work whatsoever. Had the appellant given a month's notice and refrained from having any drayage done during that time, the appellee would still have had his expenses but no compensation. It is obvious therefore the court injected provisions in the contract requiring restitution which were never intended.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 2 AND 3.

In answer to the appellant's argument on Specifications of Error Nos. 2 and 3, the appellee relies upon the appellant's failure to object to the court's interrogation of the witness, Doolittle, on the question of special damages. Few lawyers will dispute

the contention that it is a tactless practice, to say the least, to object to questions propounded by a trial judge. The form of the questions propounded by the trial judge was not such as would clearly indicate that the trial judge was seeking to establish evidence on special damages. The information sought by the trial judge could very well have been used as a method for arriving at the anticipated profits which the appellee might have received if the contract had not been cancelled. Therefore, no objection was indicated at the time and the appellant's rights should not be prejudiced by failure to so object.

If the appellee seeks to rely upon a failure to object, then the appellant is entitled likewise to rely upon the fact that the appellee did not move to amend his pleadings to cover special damages. If such a request had been made and the appellant had not objected at that time, then there might be some merit in the appellee's contention. Since no such motion was made, the appellant could not object thereto.

REPLY TO APPELLEE'S ARGUMENT ON APPELLANT'S SPECIFICATION OF ERROR No. 4.

In answering appellant's argument on Specification of Error No. 4, the appellee contends that the dispute between the parties is predicated upon a question of law. The appeal made by the appellee to the

Secretary of the Treasury clearly shows that the dispute as presented in that appeal was whether or not the appellant had good and sufficient cause to cancel the contract, in other words, a question of fact. The appeal makes no claim that the notice was unreasonable nor does it request restoration to a status quo. The Secretary of the Treasury found there was good and sufficient cause for the cancellation of the contract. The trial judge did likewise. General Provision 3 of the contract provides that the decision of the Secretary of the Treasury "shall be final and conclusive upon the parties."

The question as to the reasonableness of the notice of cancellation was not raised in the appeal to the Secretary of the Treasury. In fact, the only instance where that question has been raised is in the decision of the trial judge. Nowhere in the pleadings or in the evidence as adduced by the parties at the trial was the question raised as to the reasonableness of time allowed within which the contract was to be terminated.

The appellee having submitted his dispute to the Secretary of the Treasury, is bound by the decision of that officer and has no right to bring this action.

CONCLUSION

The trial judge heard the evidence and decided that the appellant had good and sufficient cause to cancel the contract. The trial judge erred in giving a special meaning to the words "at any time" and as a result thereof, holding the appellant liable to restore the appellee to a position of status quo. The trial judge erroneously interrogated the witness upon issues not covered by the pleadings and allowed his recovery thereon when there was no motion or request on behalf of the appellee to amend the pleadings to cover such special damages. The appellee having submitted his dispute to the Secretary of the Treasury, and having received an adverse decision on such appeal, is bound by that decision and has no right to bring this action.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney